SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 583

HENRY NAPUE, PETITIONER,

vs.

PEOPLE OF THE STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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5 IN THE SUPREME COURT OF ILLINOIS

November Term, A.D., 1957

Post Conviction Number 214

HENRY NAPUE, *Plaintiff in Error,*

v.

PEOPLE OF THE STATE OF ILLINOIS, *Defendant in Error.*

Writ of Error to the Criminal Court of Cook County

Honorable Richard B. Austin, Judge Presiding.

Abstract of the Record from the Criminal Court of Cook County, Illinois

Placita.

Not abstracted because these pages do not contain material relevant to these proceedings.

Notice, motion for leave proceed as poor person, and Post Conviction Petition, filed in the office of the Clerk of the Criminal Court of Cook County on or about January 23, 1952, which omitting caption are in words and figures as follows:

IN THE CRIMINAL COURT OF COOK COUNTY, ILLINOIS—CHICAGO

6 **Post Conviction Petition—Filed January 23, 1952**

PETITIONER, HENRY NAPUE, REG. NO. 16824

THIS ACTION IS INSTITUTED UNDER SENATE BILL 630

Now comes your petitioner, HENRY NAPUE, and respectfully represents that this action for relief is brought under Senate Bill 630, which is an Act to provide a remedy for persons convicted and imprisoned in the penitentiary, who assert that rights guaranteed to them by the Constitution of the United States or the State of Illinois, or both, have been denied or violated, in proceedings in which they were convicted.

Now comes your petitioner and show that he was tried by jury and found guilty of Murder and sentenced to serve

One Hundred and Ninety-Nine Years. The late Honorable John Prystalski, Judge of the Criminal Court of Cook County, Chicago, Illinois, on the twenty second day of August, 1940, entered of record in said court the following, among other proceedings, which are in words and figures following, to-wit:

> "It is considered, ordered and adjudged by the Court that the said Defendant, Henry Napue is guilty of the said crime of Murder in manner and form as charged in the indictment in this cause, 40-939, and the said Verdict and judgment of guilty, and that he be and hereby is sentenced to confinement at hard labor in the Illinois State Penitentiary for said crime of Murder in manner and form as charged in the indictment whereof he stands convicted and adjudged guilty, for the term of One Hundred Ninety-Nine years from and after the delivery of the body of the said Defendant Henry Napue to the Illinois State Penitentiary."

A copy of the said judgment order of sentence, which the petitioner received from the Illinois Stateville Penitentiary Record Clerk is attached to this petition.

7 Due to the fact that your petitioner is without funds, he could not purchase a certified copy of the judgment from the Criminal Court Record Clerk.

The transcript of the Proceedings (EXHIBIT A) shows that One George Hamer was called as witness on behalf of the People, and having first been duly sworn, testified against your petitioner after he was brought to the courtroom from the Illinois State Penitentiary.

Page 1. Q. Where do you live now?

A. The Penitentiary, Stateville Institution.

Page 15. Q. George Hamer, you were called a little while ago to come in here and testify?

A. Yes.

Q. And you refused to come in, didn't you?

A. I did not.

Q. It took quite a while for you to get here, didn't it?
A. They had to bring me from down state.
Q. I mean while you were in the lockup here. Didn't they ask you about fifteen minutes before you got here, to testify?
A. No.
Q. Did anybody give you a reward or promise you a reward for testifying?
A. There ain't nobody promised me anything.
Q. You are testifying of your own free will?
A. Yes.
Transcript Page 17. Q. Do you know Mr. Steinberg, sitting on the opposite side here?
A. Yes, I do.
Q. Did you have a conversation with him?
8 Q. Where was that conversation had?
A. Stateville.
Q. Directing your attention to that time and place, in Stateville, did you tell Mr. Steinberg that:
Q. And didn't you tell him that you wouldn't testify in this case unless you got some consideration for it?
Mr. Meyers: I object, Your Honor, unless Mr. Steinberg is going to testify.
The Court: Overruled.
The Witness: A. I would have told him anything to get away. I didn't want to talk to him.
Mr. Naiman: Q. Did you tell him what I told you?
The Witness: A. Yes.
Q. You said you wouldn't testify unless you got some consideration
Page 18
A. Yes, I did: I told him that.
Transcript Page 25. Q. Now then, you Hamer are in jail under what term?
A. Stickup and Murder.
Q. What are you sentenced for?
A. One Hundred and Ninety-Nine Years.
Q. You hope to have that reduced don't you?

A. Well, if anybody would help me or do anything for me, why certainly I would.

Q. Weren't you expecting that when you came here today?

A. There haven't no one told me anything, no more than the lawyer. The lawyer come in and talked to me a while ago and said he was going to do what he could.

Q. Which lawyer was that?

A. I don't know; it was a Public Defender. I don't see him in here.

9 Q. You mean he was from the Public Defender's office?

A. I imagine that is where he was from, I don't know.

Q. And he was the one who told you that?

A. Yes, he told me he was trying to get something did for me.

Q. That was when you were informed that you were going to come and testify here?

A. I was informed that I was going to testify here when I left Stateville this morning.

Q. And when did this Public Defender lawyer come to see you?

A. He come back and talked to me a little while back.

Q. How long ago do you mean?

A. I don't know. There is not even a clock back there.

Q. Do you know the lawyer's name?

A. No, I don't.

Q. Was it back here in the cell while you were waiting to be called out here that he came in to see you?

A. Yes.

Q. And he told you he was going to do something for you?

A. He said he was going to try to.

Q. That was just before you got here?

A. Yes.

Transcript Page 38. Q. Now, George, while you were at Stateville here, serving your term, about two months ago were you visited by some police officers?

A. Yes, some police officers came to see me.

Q. They came and asked you about this trial, didn't they, of Henry Napue?

Page 39.

A. Yes, they said something about it.

Q. They came to ask you if you would be willing to testify, didn't they?

A. Yes.

Q. And, of course, at that time you told them that you would?

A. Yes.

Q. And you told them you would, but you expected some consideration for it?

A. I asked them was there any chance of me getting any. The man told me he didn't know, that he couldn't promise me anything.

Q. Then you spoke to a lawyer today who said he would try to get your time cut?

A. That was this Public Defender. I don't even know his name. I could point him out, if I saw him.

Q. How do you know he is from the Public Defender's Office?

A. I seen him once before when I was being tried.

Q. But you don't know he is from the Public Defender's Office?

A. No, I don't know where he is from.

Redirect Examination by Mr. Meyers:

Q. Mr. Hamer, has Judge Prystalski promised you (Page 39) (Page 40) any reduction of sentence?

A. No, sir.

Q. Have I promised you that I would recommend any reduction of sentence to anybody?

A. You did not.

Q. Has any Judge of the Criminal Court promised that they would reduce your sentence?

A. No, sir.

Q. Has any representative of the Parole Board been to see you and promised you a reduction of sentence?

A. No, sir.

Q. Has any representative of the Governor of the State of Illinois promised you a reduction of sentence?

A. No, sir.

11 Q. What Judge sentenced you, do you recall that?

A. Judge Fardy.

Transcript Page 43. Certified certificate by the shorthand reported, Gene P. Charters.

In order to impeach George Hamer in the above testimony your petitioner now presents through a petition certified by the Criminal Court Clerk and filed by Morris G. Meyers in behalf of George Hamer in the nature of a writ of error coran nobis and by virtue of Section 72 of the Practice Act, or in the alternative, for the issuance of the writ of habeas corpus. Morris G. Meyers was the Assistant State's Attorney promised to assist him in having his term reduced for his testimony against Napue, who denied his guilt and still maintains that he is innocent and did not participate in any murder as claimed by Hamer.

(EXHIBIT "B") Page 4 contains the following statement:

Your petitioner, Morris G. Meyers, well knowing that identification of Poe, Napue and Webb if and when apprehended would be of an unsatisfactory character and not the kind of evidence upon which a jury could be asked to inflict a proper severe penalty, and being unable to determine in advance whether Poe, Napue and Webb would make confessions of their participation in the crime, represented to HAMER that if he would be willing to cooperate with law enforcing officials upon the trial of trials of Poe, Napue and Webb when they were apprehended, that a recommendation for a reduction of his sentence would be made and, if possible, effectuated. Hamer at that time unhestitatingly expressed a complete willingness to cooperate at any time he would be called upon.

Page 6. Before testifying on behalf of the State and against Napue, HAMER expressed to your petitioner a reluctance to cooperate any further unless he were given definite assurance that a recommendation for reduction of his sentence would be made. Your petitioner Morris G.

Meyers, feeling that the interest of justice required Hamer's testimony, again assured Hamer that every possible effort would be made to conform to the promise previously made to him. Hamer took the witness stand and without equivocation proceeded to supply, in detail, under oath, all the testimony which corroborated completely the confession made by Napue, without
12 Hamer's testimony a conviction of Napue upon his uncorroborated confession may have been extremely doubtful.

Certificate of Certification to above petition signed and sealed by the Criminal Court Clerk, Vincent J. Poklacki.

Now comes your petitioner and asserts that he was denied his constitutional right and it was violated because he was not tried by an impartial jury guaranteed by the Illinois State Constitution Article 2, Section 9, in as much that George Hamer did not tell the truth that he was promised assistance by the Assistant State's Attorney, Morris G. Meyers, in having his term reduced for his testimony against Napue. Thereby no one can say how much Napue's Jury trial influenced the Jury impartially to impose the maximum term of Murder. As a results of the aforesaid facts as presented in this petition, your petitioner was denied due process of law guaranteed by Article 2, Section 2, of the Illinois State Constitution, and Amendment fourteen of the United States Constitution.

HENRY NAPUE,
1624, Joliet, Ill.
Box 1112

STATE OF ILLINOIS, } ss:
COUNTY OF WILL }

Affidavit

HENRY NAPUE, first being duly sworn upon his solemn oath, deposes and states that he is the petitioner and as such is authorized to make this affidavit; that he is familiar

with the contents of the within petitioner and that
13 the matters, things and exhibits therein set forth are true.

Subscribed and sworn to before me, a Notary Public in and for the County and State aforesaid, on the day of A.D. 1952.

My commission expires A.D. 1953.

Notary Public.

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14 **Abstract of Bill of Exceptions**

The Bill of Exceptions, dated August 13, 1940, containing the testimony of George Hamer, in a certain proceeding.

IN THE CRIMINAL COURT OF COOK COUNTY

August Term, A.D. 1940

Indictment No. 40-939

THE PEOPLE OF THE STATE OF ILLINOIS

v.

HENRY NAPUE.

August 13th, 1940

Before Hon. John Prystalski, J.

Testimony of GEORGE HAMER.

Which Bill of Exceptions is abstracted as follows:

GEORGE HAMER

called as a witness on behalf of The People, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Meyers:

My name is George Hamer, I am 26 years of age, I now live at Statesville Institution. Before that, I stayed at 18 East Illinois Street where I was rooming for a while.

I stayed also at 4744 So. Dearborn. I didn't have much education. My parents are living. My mother is living at 4744 So. Dearborn Street and my father is in the southern states somewhere. In August 1938, I worked at the Loop End Garage, 520 N. Wabash. I knew a Dr. Steinberg while I worked there. His office was on Rush Street. I went up there several times.

I picked up checks for the garage and I delivered his car there.

I knew the defendant Henry Napue. I had known him about five years. I knew a young man named Howard Poe. I knew Trussie Townsend. I knew Lucius Webb. I've known these boys around three to five years. I remember the night of August 20, 1938. We first met in the car at Paul's Beer Tavern, Oak and Sedgwich Street. There I met Lucius Webb, Henry Napue, Howard Poe and Trussie Townsend.

The car I mentioned was Lucius Webb's car. It was a ford and I think a darkish color. It had white wall tires and it was a 1938 four door. When I met these four men, they were in the car. They didn't have anything to say to me Howard Poe did the talking. He was talking to Henry and the others in the car. By Henry I mean the defendant. I don't know what Poe said. I didn't hear the conversation. It was about 1:00 in the morning, early Sunday morning August 21st. I went into the tavern alone. No one went in.

And shook dice with the bartender and I paid him a little bill I owed him. When I came back Howard Poe asked me if I wanted to go on a job with him. Napue was sitting in the back of the car. When he said to go out on a job with him I understood what he meant, he meant go out and stickup, pull a job. I told him yes, no one said anything else that I remember.

We got into the car and went into the garage and put some gas in and drove to 2400 Clark Street. Lucius Webb was driving. Napue was in the front. That is Napue there. (indicating) I and Trussie Townsend and Howard Poe

were in the back. We went to a beer tavern at
16 2400 Clark Street. In the car there was some joking and laughing and talking, just different things. Nothing was said about what kind of place we were going to stickup. When we got to the vicinity of 2400 Clark Street, Howard Poe got out and walked down the alley. He came back and we drove away. We stayed away quite awhile. We drove around the neighborhood West and then back. I don't know why we were driving around. Then we came back. Howard got out and took a knife and cut the screen door. When we came back to the vicinity of 2400 Clark Street we parked in an alley.

I don't know which way we were facing at that time of the night. All of us got out of the car. Lucius Webb opened the trunk and took the guns out, the guns were in a gunny sack. I was given a shotgun. About 36 inches long. I don't know what kind of gun Napue had.

It was some kind of revolver. Poe had some kind of revolver. I had the only shotgun. Webb had a gun. Townsend had a gun. We had handkerchiefs to cover our faces. All of us had handkerchiefs on our faces. Poe cut the screen. With a knife. Poe was the first one in there the second one was Trussie Townsend, I was third. Napue followed me and then Webb. There were people in the place, mostly men. I remember seeing one woman. I had my shotgun in my hand, and Townsend was back just about middle ways of the bar. Poe and the others were back there.

Someone, started shooting, I don't know who it was. If
17 there were any other colored people in there besides me and my companions I didn't see them. I did not shoot. There were quite a few shots but I wouldn't know how many. When the shooting started I started to break for the back door. I got shot in the stomach, in the side of my stomach. I didn't fall down I got out.

I got in the automobile the boys wanted to leave me. Henry Napue said, "No we will take him away". They took me to Dr. Steinberg's office. Napue asked me where I wanted to go I told him to take me to Dr. Steinberg's.

Dr. Steinberg put some iodine on my back. Napue and the others went away. The police came. They took me to Provident Hospital.

Cross-Examination

By Mr. Naiman:

I said I live at 18 East Illinois. That was the home of Mrs. Napue. I lived here about six months. It was in the same apartment where she lived. I lived there at times when Mr. Napue was not there. I liked Mrs. Napue, she was a friend of mine. I knew her.

I did not know her intimately. At no time. I was called a while ago to come here and testify. I did not refuse to come in. They had to bring me from down state.

Q. I mean while you were in the lockup here. Didn't they ask you about fifteen minutes before you got here, to testify?

A. No.

Q. Did anybody give you a reward or promise you a reward for testifying?

18 A. There ain't nobody promised me anything.

Q. You are testifying of your own free will?

A. Yes.

I have not had a fight with Henry Napue. I have never had a fight with him. I never told him I would not let him have his wife. I have never said to him that as long as I live I would see to it that he did not have his wife.

I said Napue took me to the Doctor. Somebody wanted to throw me out. I had a couple of beers that day I had not been drinking since one o'clock that day, I did not spend $5.00 on drinks that day.

I know Mr. Steinberg sitting on the opposite side here. I had a conversation with him in Statesville. I did not tell Mr. Steinberg I was drunk that day. I told him I wouldn't testify unless I got some consideration for it. I would have told him anything to get him away. I didn't want to talk with him.

At the time I was arrested they pushed me around a little.

I said I saw Henry Napue about one o'clock before this tavern around Oak Street. It might have been about that time because I got off work about 12:00 late in the evening. I didn't hear any conversation between Townsend, Poe and others and Henry Napue. I don't know what they were talking about. I haven't any idea. I went inside the tavern.

That was Paul's place. I went to the tavern and shoot dice. I had a couple of beers. I didn't have any liquor. I can't say how long I was in the tavern. It wasn't quite an hour.

It was less than an hour. Then I came outside
19 and saw a group of people in the car. I was not out
I could remember pretty good. I had a couple of beers. I worked that day until midnight. I didn't change my clothes before I went to the tavern. I had on a pair of trousers and a shirt.

I didn't go directly to the tavern from work. I delivered a car to Miss Novak. I went to the garage. I didn't have a watch. It was somewhere after twelve o'clock that I left work. I went to the tavern directly from my place of work.

I didn't stop at any taverns on the way to this one. I am now in jail under a term for stickup and murder. I have been sentenced for One Hundred and Ninety-Nine Years. With hope that if any body would help me or do anything for me that my sentence will be reduced.

Q. Weren't you expecting that when you came here today?

A. There haven't no one told me anything, no more than the lawyer, the lawyer come in and talked to me a while ago and said he was going to do what he could.

Q. Which lawyer was that.

A. I don't know; it was a Public Defender. I don't see him in here.

Q. You mean he was from the Public Defender's Office?

A. I imagine that is where he is from, I don't know.

Q. And he was the one who told you that?

A. Yes, he told me he was trying to get something did

for me. I was informed that I was going to testify when I left Statesville this morning. This Public Defender lawyer came back and talked to me a while back. I
20 don't know how long ago. I don't know the lawyers name. It was while I was back in the cell that he came in to see me. He told me he was going to try to do something for me. That was just before I got here.

Mr. Naiman: Q. So you were promised something would be done for you, is that right?

The Witness: A. No, I wasn't promised. I said the man—

Mr. Meyers: I object.

The Court: Overruled. He may answer.

The Witness: I went to the garage and delivered a car downtown to the hotel Chicagoan and went back to the garage. Then I went to Pauls's tavern. I met several guys on the way. I don't remember just who they were. I visited around a couple of minutes with Dorsey, that was at Chicago Avenue on the way to Oak Street. By "visiting around" I just stopped there and talked a couple of minutes and went on. I did not go any place with him. I did not meet anyone else. I went in the tavern, I shook dice, and drank at the tavern and came out.

It was Lucius Webb's car. I had a couple of beers by that time. I drink quite a bit occasionally. I have been drunk about twice in my life. I told Mr. Steinberg that I had used up $5.00 in drinks that day. I used up that money.

It was in my money, I lost to the man I was shaking dice from. I won one or two games and we would double them up and shake them back. We were gambling there, we couldn't lose to many on that little money. What I won I took in trade. I made a statement. I didn't make the statement that I was drunk when I went out
21 on the job.

I made a statement that anyone could have smelled liquor on me. I don't know whether coming back the car went directly to Dr. Steinberg's. I don't know where the

car stopped. I don't remember stopping no place. I was bleeding pretty much. I was shot in the stomach. I don't know how long it took to get to Dr. Steinberg's office. I was feeling pretty bad.

I was getting dizzy. It was a smoky like, drowsy like and hazy. I wasn't clear on the details after I got shot. I don't know what happened after I got shot. Henry Napue pleaded with the others not to throw me out on the road. It was before we got to Dr. Steinberg's.

At that time Poe was in the car with me. It was Poe who wanted to dump me out. He was the leader of the gang. He didn't try to urge anyone to throw me out. He just said that. I didn't hear him say it was dangerous thing to carry me around. He said to throw me out on the road. I wouldn't say how far it was before we got to the doctor.

I had a room in Napue's house off and on for about six months. I paid for the room. I did not help Mrs. Napue with her expenses. I was also living on the Southside with my mother and stayed many a night there. I might say I was there better than half the time. I couldn't say how much closer it was.

My home was with my mother. I lived there but sometimes I got off work late and was tired. A large bit of time, I lived at Henry's house. I knew Henry lived with his mother sometime. I don't know just how long he lived with his mother.

22 I did not have a fight with Henry on the particular day I was shot. I did not exchange blows with him. We never fought. I never said to Henry that I would never let him have his wife alive. I testified a moment ago that I was roughed up a bit when I was arrested.

I made a confession to the police.

I was given One Hundred and Ninety-Nine Years. My trial was first. Poe was tried after me. I did not testify against Poe. I did not testify in his trial. While I was in Statesville, some police officers came to visit me. They came to ask me about the trial of Henry Napue.

They asked me if I would be willing to testify. I told them yes. I asked them if there was any chance of my getting some consideration. The man told me he didn't know, that he couldn't promise anything.

Q. Then you spoke to a lawyer today who said he would try to get your time cut?

A. That was this Public Defender, I don't even know his name I could point him out if I saw him.

Q. How do you know he is from the public Defender's office?

A. I seen him once before when I was being tried. But I don't know if he was from the Public Defender's office.

Redirect Examination

By Mr. Meyers:

Judge Prystalski has not promised me any reduction of sentence.

Q. Have I promised you that I would recommend any reduction of sentence to anybody?

23 A. No you did not. No Judge, or representative of the Parole Board or of the Governor has promised me any reduction of sentence. I was sentenced by Judge Fardy and was represented by a lawyer.

I talked to the lawyer before I enterd my plea of guilty. Judge Fardy sentenced me to One Hundred and Ninty-Nine Years in the penitentiary. I made a statement to you in the Bridewell Hospital.

At the Bridewell Hospital I was still suffering from a gunshot wound.

Witness excused.

Not abstracted because these pages do not contain material relevant to these proceedings.

24 STATE OF ILLINOIS } ss:
COUNTY OF COOK }

IN THE CRIMINAL COURT OF COOK COUNTY

C. N. #55

PEOPLE OF THE STATE OF ILLINOIS EX REL MORRIS G. MEYERS IN BEHALF OF GEORGE HAMER, *Petitioner,*

v.

JOSEPH E. RAGEN, WARDEN, ILLINOIS STATE PENITENTIARY, *Respondent.*

Petition in the Nature of a Writ of Error Coram Nobis Under and by Virtue of Sections 72 of the Practice Act, or Paragraph 196 of Chapter 110 Illinois Revised Statutes, 1945, or in the Alternative, for the Issuance of the Writ of Habeas Corpus.

Your petitioner, MORRIS G. MEYERS, respectfully represents unto this Honorable Court that he presents herewith his verified petition for and in behalf of one GEORGE HAMER presently incarcerated in the Illinois State Penitentiary.

Your petitioner represents that he is an attorney-at-law regularly licensed to practice in the State of Illinois; that on and for sometime prior to August 21, 1938, your petitioner was in the employ of the State's Attorney of Cook County as an Assistant State's Attorney and in that capacity was assigned to conduct the investigation and preparation for ultimate trial of a matter wherein
25 one PATRICK O'MALLEY, a police officer of the city of Chicago, was fatally wounded in a cocktail lounge in the vicinity of Clark Street and Fullerton Avenue while attempting to frustrate an attempted robbery in the early morning of August 21, 1938. It is further represented that the facts attendant to the aforementioned attempted robbery and subsequent shooting of Officer O'Malley are substantially as follows:

Four colored men entered Neeley's Cocktail Lounge at 2405 North Clark Street, through the rear entrance, about

3:00 A. M. of August 21, 1938. All of the men were armed. One of the men, GEORGE HAMER, took a position at the front door and he held in his hands what appeared to be a shotgun, pointing the gun towards the floor. The other three men, HOWARD POE, HENRY NAPUE AND TRUSSIE TOWNSEND, took positions at or near the center of the store with revolvers. One of the men, not HAMER, announced that it was a stickup and immediately there began a wild melee of shooting. It appears that Officer Patrick O'Malley, who was off duty at the time, and in civilian attire, immediately upon ascertaining that a holdup was contemplated, drew his service revolver and shot as often as the bullets in his gun would permit. HAMER did not shoot but immediately tried to get out of the store through the front door and finding that locked, dropped his gun and started toward the rear. POE, NAPUE and TOWNSEND returned Officer O'Malley's fire and HAMER was caught in the crossfire and was shot through the chest, either by one of Officer O'Malley's bullets or one of his accomplices, (it has never been ascertained which). TRUSSIE TOWNSEND was shot, staggered towards the rear door and collapsed in a
26 small room adjoining the rear entrance, where he was found dead within a few minutes by other police officers. Officer O'Malley lay mortally wounded in a booth adjoining the bar. (He died from the effects of his wounds nine days later). In the meantime, NAPUE and POE helped HAMER out of the rear of the cocktail lounge to the alley where one LUCIUS WEBB was waiting at the wheel of an automobile. They drove to the office of Dr. Fred B. Steinberg at Rush and State Street and left HAMER in Dr. Steinberg's office. The doctor rendered first aid and promptly called the police. Before the police arrived POE, NAPUE and WEBB left. HAMER was taken into custody and removed to the Bridewell Hospital. Some days later, after he had recovered from the shock of the wound in his chest, Captain Thomas Duffy and Sergeant William Higgins of the 37th Police District interrogated HAMER and he promptly told the police officers of his participation in the attempted robbery and specifically named

all of his accomplices. Shortly afterwards he was formally questioned by your petitioner, with a stenographer present, and again repeated the details of what occurred the early morning of August 21, 1938, and again specifically named the men who were with him. Up to the time HAMER was questioned *no one knew the names of the other participants* and there was *no certainty that there was any evidence connecting* HAMER *with the incident.* The cocktail lounge at the time of the shooting was poorly lighted and with the excitement that followed the shooting *identifications by persons upon the scene were highly questionable.* In his statement to your petitioner, HAMER stated in substance that he went for an automoble ride
27 with POE, NAPUE, WEBB and TOWNSEND and was not told that they were embarked upon a robbery. He saw no guns until the car pulled into the alley in the rear of the cocktail lounge and then for the first time POE thrust a shotgun into his hands and told him he had to come along. He was instructed to stand by the front door, and that as soon as the shooting started he tried to get out the front door, found that locked, dropped his gun, ran towards the rear, was shot through the chest, helped out into the car and left at Dr. Steinberg's office. Mr. and Mrs. Neeley, proprietors of the cocktail lounge who were present during the shooting, confirmed HAMER's statement that he did no shooting. That portion of HAMER's statement that he did not know he was to engage in a robbery until he got into the alley, was obviously impossible of confirmation until such time as POE, NAPUE and WEBB were apprehended.

Your petitioner further avers that on or about November 29, 1938, he appeared before the Cook County Grand Jury and there presented evidence against GEORGE HAMER, *which evidence in the main consisted of* HAMER'S *written confession,* and that thereafter, a true bill was voted charging GEORGE HAMER with the crime of murder of Patrick O'Malley (Indictment No. 38-1995). That on February 20, 1939, the aforementioned indictment came on for hearing before the Honorable James Fardy (since de-

ceased) one GEORGE HAMER thereupon entered a plea of guilty and was sentenced to the Illinois State Penitentiary for the determinate term of One Hundred and Ninety-Nine Years (199). After HAMER was sentenced *your petitioner well knowing that identification of* POE, NAPUE
28 *and* WEBB if and when apprehended *would be of an unsatisfactory character and not the kind of evidence upon which a jury could be asked to inflict a proper, severe penalty,* and being unable to determine in advance whether POE, NAPUE and WEBB would make confessions of their participation in the crime, *represented to* HAMER *that if he would be willing to cooperate* with law enforcing officials *upon the trial of trials of* POE, NAPUE *and* WEBB when they were apprehended, that *a recommendation for a reduction of his sentence would be made and, if possible, effectuated.* HAMER *at that time unhesitatingly expressed a complete willingness* to cooperate at any time he would be called upon.

It is further averred that some months thereafter, HOWARD POE was apprehended and shortly after his apprehension made a full and complete confession of his participation in the shooting, and in doing so corroborated substantially what HAMER had stated previously about HAMER's unwilling participation in attempted robbery. POE admitted that he fired some shots in the cocktail lounge and further admitted that he, together with NAPUE and several others, (not HAMER) had for several weeks prior to August 21, 1938 held up, at the point of a gun, several taverns on the north side of Chicago. In addition thereto, it developed that POE had a long criminal record. POE was indicted on November 10, 1939 (Indictment No. 39-1699) and was tried by jury on a plea of not guilty before the Honorable John Bolton. He was found guilty of murder and his punishment fixed to death. He was executed on April 19, 1940. HAMER was not used as witness upon the trial of POE because of the very complete nature of
29 POE's confession, in addition to which there was a partial identification POE by Mrs. Neeley and evidence of POE's participation in other robberies preceding

the shooting was admitted by the trial Judge on the theory of motive. In addition, POE had a provable criminal record.

Several months later, HENRY NAPUE was apprehended and returned to Chicago. Upon being confronted with HAMER's confession, he readily admitted his part in the crime and signed a confession wherein he too in substance confirmed what HAMER had previously stated, that HAMER was an unwilling participant in the attempted robbery. NAPUE also admitted taking part in several other robberies before the shooting. In the preparation for trial of the case against NAPUE, it became apparent that strenuous opposition would be encountered from the defendant and his counsel. Mrs. Neeley had moved to California and if brought back, *and identification at that late date* with so much time intervening from the time of the commission of the offense, *would at best be highly questionable.* It developed therefore, that additional testimony other than NAPUE's confession was desirable to avoid a possible miscarriage of justice. A writ of habeas corpus and testificandum was issued out of this Court directed to the warden of the penitentiary requiring the appearance of GEORGE HAMER as a witness upon the trial of NAPUE. (It developed that HAMER's *testimony was extremely important because the trial Judge* presiding at the trial of NAPUE *ruled against the State's* contention that evidence of previous robberies were admissable). NAPUE was indicted on June 18, 1940 (Indictment No. 40 939). He subsequently entered a plea of not guilty, before the Honorable John Prystalski, and the trial proceeded before a jury. The trial was bitterly contested and resulted in a verdict finding NAPUE guilty of murder and fixing his punishment at One Hundred and Ninety-Nine Years (199). *Before testifying* on behalf of the State and *against* NAPUE, HAMER *expressed to your petitioner a reluctance to cooperate* any further *unless he were given definite assurance that a recommendation for reduction of his sentence would be made.* Your petitioner, feeling that the interests of justice required HAMER's testimony, *again assured* HAMER *that every possible effort would be made*

to confirm to the promise previously made to him. HAMER took the witness stand and without equivocation proceeded to supply, in detail, under oath, all the testimony which corroborated completely the confession made by NAPUE. *Without* HAMER'S *testimony a conviction of* NAPUE upon his own *uncorroborated confession may have been extremely doubtful.*

Almost one year later the last of the persons named by HAMER as participating in the crime of August 21, 1938, LUCIUS WEBB, was taken into custody in the east and returned to Chicago. He too was shown the original confession made by HAMER and the confessions of the others that followed, and he too promptly made a confession of his part in the attempted robbery of Neeley's Cocktail Lounge. Your petitioner at this time was no longer connected with the office of the State's Attorney of Cook County being at that time engaged in the private practice of law. Mr. David Leeds was at this time assigned to the case of WEBB and it was in answer to Mr. Leed's questions that WEBB made his confession. Mr. Leeds appeared before the Cook County Grand Jury and an indictment for murder was voted against WEBB on June 10th 1941 (No. 41-
31 948). That indictment was assigned to the Honorable John Sbarero for trial. Appearing in behalf of the defendant was Attorney Richard Westbrooks, of the firm of Ellis & Westbrooks; an exceptionally able practitioner of long experience at the bar, particularly skilled in the defense of persons charged with crime. The question again arose of proceeding to trial against WEBB with only his own uncorroborated confession. Mr. Leeds, in charge of the prosecution, sued out a writ of habeas corpue and testificandum and again HAMER was returned to testify for State. After the selection of the jury and just prior to the commencement of the taking of testimony, HAMER *requested to talk to Mr. Leeds and stated that he would not testify against* WEBB *because the State had not kept its promise to him for his previous testimony.* Mr. Leeds, Captain Thomas Duffy and Officer William F. O'Malley, a brother of the deceased police officer, for

whose murder WEBB was on trial, all spoke to HAMER in the lockup adjoining the court room of Judge Sbarero and attempted to prevail upon him to cooperate. HAMER took position that since the State had taken no steps whatsoever *to aid him as previously pledged,* he felt he was *no longer bound to assist the law* enforcing agencies. Mr. Leeds explained to HAMER that nothing could be done for him until and unless all the persons involved in the crime were apprehended, prosecuted and punished, and that since WEBB was the last of those persons some action would be taken for HAMER after the trial of WEBB. *Mr. Leeds, Captain Duffy and Officer O'Malley specifically and unequivocally promised* HAMER *that if he gave testi-*
32 *mony* against WEBB *they would individually and collectively take definite steps to do everything within their sphere of power and influence to see to it that his sentence would be appreciable reduced.* HAMER testified against WEBB. WEBB was found guilty of murder, and his sentence fixed at One Hundred and Ninety-Nine (199) Years. HAMER was returned to the penitentiary without any action taken by any law enforcing agency in the courts in connection *with the promise made to him.* Shortly after his return, HAMER was assigned to the Menard Branch of the penitentiary so that he might not be in contact with NAPUE or WEBB.

Your petitioner respectfully represents that had the Honorable James Fardy, the Judge before whom HAMER entered a plea of guilty known all the confirmed facts leading up to the shooting; that is, had the trial court known from others as well as HAMER that he was an unwilling participant in the attempted robbery which culminated in the shooting of Officer Patrick O'Malley, he, the trial Judge undoubtedly would not have entered the kind of judgment and sentence imposed upon him of One Hundred and Ninety-Nine Years, but would have instead sentenced him to an appreciable lesser number of years.

Your petitioner therefore respectfully prays this Honorable Court to enter an order assuming jurisdiction over the person of GEORGE HAMER: And for a further order

directing that the People's Writ of Habeas Corpus Ad Testificandum issue, directed to Joseph E. Ragen, Warden of the Illinois State Penitentiary, directing the said Joseph E. Ragen to have the body of GEORGE HAMER before this Honorable Court on a day certain to give testimony in the above entitled cause, touching upon the matters and
33 things herein set forth.

Your petitioner further represents that by virtue of the *repeated promises that were made to* GEORGE HAMER, *by your petitioner, while acting as an Assistant State's Attorney,* and the *promises* made by police officials, and by Assistant State's Attorney David Leeds to GEORGE HAMER: That subparagraph 2 of paragraph 22 of Chapter 65 of the Illinois Revised Statutes, 1945 is applicable, said Section being in words and figures as follows, to-wit:

22. *Causes for discharge when in custody on process of Court:*

2. "Where, though the original imprisonment was lawful, yet by some act, omission or event which has subsequently taken place, the party has become entitled to his discharge."

Your petitioner respectfully urges this Honorable Court to construe the aforesaid section of the Habeas Corpus Act with effectual *consummation of the compact entered into between the duly authorized representatives of the State of Illinois and* GEORGE HAMER.

Wherefore, your petitioner prays this Honorable Court, in the alternative, to enter an order directing that the Peoples' Writ of Habeas Corpus issue out of and under the seal of this Court directed to JOSEPH E. RAGEN, Warden of the Illinois State Penitentiary, directing and commanding the said Joseph E. Ragen to have before this Court, upon a day certain, the body of GEORGE HAMER, and to abide by such further orders of this Court that may be entered from day to day.

MORRIS G. MEYERS (s)

34 STATE OF ILLINOIS } ss:
COUNTY OF COOK }

MORRIS G. MEYERS, deposes and says that he has read the foregoing petition by him subscribed and that as to those matters within his direct, personal knowledge he affirms those matters to be the truth; as to those matters and things not within his direct personal knowledge he affirms them to be true upon information and belief.

MORRIS G. MEYERS (s)

SUBSCRIBED AND SWORN TO
before me this 25th day
of April, A. D. 1946.

HAROLD J. BERGER
Notary Public

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35 Not abstracted because these pages do not contain any material relevent to these proceedings.

Amended Petition for Post Conviction Review, filed in the office of the Clerk of the Criminal Court of Cook County on August 4, 1952, which amended petition, omitting caption, is in words and figures as follows:

IN THE CRIMINAL COURT OF COOK COUNTY, ILLINOIS—CHICAGO

PETITIONER, HENRY NAPUE, REG. NO. 16824

THIS ACTION IS INSTITUTED UNDER SENATE BILL 630

In Re: 214

An Amended Petition—Filed August 4, 1952

Now comes your petitioner, HENRY NAPUE, and respectfully represents that this action for relief is brought, under Senate Bill 630, which is an Act to provide a remedy for persons convicted and imprisoned in the penitentiary, who assert that rights guaranteed to them by the Constitution of the United States or the State of Illinois, or

both, have been denied or violated, in proceedings in which they were convicted.

Now come your petitioner and shows that he was tried by Jury and found guilty of Murder and sentenced to serve ONE HUNDRED AND NINETY-NINE YEARS. The late Honorable John Prystalski, Judge of the Criminal Court of Cook County, Chicago, Illinois, on the twenty second day of August, 1940, entered of record in said court the following, to-wit:

> "It is considered, ordered and adjudged by the Court that the said Defendant, Henry Napue is guilty of the said crime of Murder in manner and form as charged in the indictment in this cause No. 40-939, and the said Verdict and Judgment of guilty, and that he be and hereby is sentenced to confinement of hard
> 36 labor in the Illinois State Penitentiary for said crime of Murder in manner and form as charged in the indictment whereof he stands convicted and adjudged guilty, for the term of ONE HUNDRED AND NINETY-NINE YEARS from and after the delivery of the body of the said Defendant HENRY NAPUE to the Illinois State Penitentiary."

A copy of the said judgment order of sentence, which the petitioner received from the Illinois Stateville Penitentiary Record Clerk is attached to this petition. Due to the fact that your petitioner is without funds, he could not purchase a certified copy of the judgment from the Criminal Record Clerk.

The transcript of the Proceedings (EXHIBIT "A") shows that One George Hamer was called as a witness in behalf of the People, and having first been duly sworn, testified against your petitioner after he was brought to the Courtroom from the Illinois State Penitentiary.

Page 1. Q. Where do you live now? A. The Penitentiary, Stateville Institution.

Page 15. Q. George Hamer, you were called a little while ago to come in here and testify. A. Yes. Q. And you

refused to come in, didn't you? A. I did not. Q. It took quite a while for you to get here, didn't it? A. They had to bring me from down state. Q. I mean while you were in the lockup here. Didn't they ask you about fifteen minutes before you got here, to testify? A. No. Q. Did anybody give you a reward for testifying? A. *There ain't nobody promised me anything.* Q. *You are testifying of your own free will?* A. *Yes.*

Page 17. Q. Do you know Mr. Steinberg, sitting on the opposite side here? A. Yes, I do. Q. Did you have a conversation with him. A. Yes. Q. Where was that conversation had? A. Stateville. Q. Directing your attention to that time and place, in Stateville, did you tell Mr. Steinberg that: Q. And didn't you tell him that you wouldn't testify in this case unless you got some consideration for it? M. MEYERS: I object, Your Honor, unless Mr. Steinberg is going to testify. THE COURT: Overruled. The WITNESS: A. *I would have told him anything to get away.* Mr. NAIMAN: Q. Did you tell him what I told you? The WITNESS: A. Yes. Q. You said you wouldn't testify unless you got some consideration?

37 Page 18. A. Yes, I did. Told him that.

Page 25. Q. Now then, you Hamer are in jail under what term? A. Stickup and Murder. Q. What are you sentenced for? A. One Hundred Ninety-Nine Years. Q. You hope to have that reduced don't you? A. *Well, if anybody would help me or do anything for me, why certainly I would.*

Q. Weren't you expecting that when you came here today? A. There haven't no one told me anything, no more than the lawyer come in and talked to me a while ago and said he was going to do what he could. Q. Which lawyer was that? A. You mean he was from the Public Defender. I don't see him in here. Q. I imagine that is where he is from, I don't know. Q. And he was the one who told you that? A. Yes, he told me he was trying to get something did for me. Q. That was when you were informed that you were going to come and testify here? A. I was informed that I was going to testify here when

I left Stateville this morning. Q. And when did this Public Defender lawyer come to see you? A. He come back and talked to me a little while back. Q. How long ago do you mean? A. I don't know. There is not even a clock back there. Q. Do you know the lawyer's name? A. No, I don't. Q. Was it back here in the cell while you were waiting to be called out here that he came in to see you? A. Yes. Q. And he told you he was going to do something for you? A. He said he was going to try to. Q. That was just before you got here? A. Yes.

Page 38. Q. Now, George, while you were at Stateville here, serving your term, about two months ago were you visited by some police officers? A. Yes, some police officers came to see me. Q. They came and asked you about this trial, didn't they of Henry Napue?

Page 39. A. Yes, they said something about it. Q. They came to ask you if you would be willing to testify, didn't they? A. Yes. Q. And you told them you would but you expected some consideration for it? A. I asked them was there any chance of me getting any. The man told me he didn't know, that he couldn't promise me anything. Q. Then you spoke to a lawyer today who said he would try to get your time cut? A. That was this Public Defender. I don't even know his name. I could point him out, if I saw him. Q. How do you know he is from the Public Defenders Office? A. I seen him once before when I was being tried. Q. But you don't know he is from the Public Defender's Office? A. No, I don't know where he is from.

REDIRECT EXAMINATION BY MR. MEYERS.

Pages 39-40. Q. *Mr. Hamer, has Judge Prystalski promised you any reduction of sentence?* A. *No sir.* Q. *Have I promised you that I would recommend any reduction of sentence to anybody?* A. *You did not.* Q. Has any Judge of the Criminal Court Promised that they would reduce your sentence? A. No, sir. Q. Has any representative of the Parole Board been to see you and promised you a reduction of sentence? A. No, sir.

Q. Has any representative of the Governor of the State of Illinois promised you a reduction of sentence. A. No, sir. Q. What Judge sentenced you; do you recall that? A. Judge Fardy.

Transcript Page 43, Certified certificate by the shorthand reporter, MR. GENE P. CHARTERS.

In order to impeach George Hamer in the above testimony your petitioner now presents through a petition certified by the Criminal Court Clerk and filed by Morris G. Meyers in behalf of George Hamer in the nature of a writ of error coram nobis and by virtue of Section 72 of the Practice Act, or in the alternative, for the issuance of the writ of habeas corpus. Morris G. Meyers was the Assistant State's Attorney, who prosecuted Henry Napue at his trial. George Hamer emphatically denied at petitioner's trial that anyone or the Assistant States's Attorney—Morris G. Meyers—promised to assist him in having his term reduced for his testimony against Napue, *who denied his guilt and still maintains that he is innocent and did not* participate in any murder as claimed by Hamer.

(EXHIBIT "B") Page 4 Contains the following statements:

"Your petitioner, Morris G. Meyers, well knowing that identification of Poe, Napue and Webb if and when apprehended would be of an unsatisfactory character and not the kind of evidence upon which a jury could be asked to inflict a proper, severe penalty, and being unable to determine in advance whether Poe, Napue and Webb would make confessions of their participation in the crime, represented to HAMER that if he would be willing to cooperate with the law enforcing officials upon the trial or trials of Poe, Napue and Webb when they were apprehended, that a recommendation for a reduction of his sentence would be made and, if possible, effectuated. Hamer at that time unhesitatingly expressed a complete willingness to cooperate at any time he would be called upon.

39 Page 6. "Before testifying on behalf of the State and against Napue, HAMER expressed to your peti-

tioner a reluctance to cooperate any further unless he were given definite assurance that a recommendation for reduction of his sentence would be made. Your petitioner, Morris G. Meyers, feeling that the interest of Justice required Hamer's testimony, again assured Hamer that every possible effort would be made to conform to the promise previously made to him. Hamer took the witness stand and without equivocation proceeded to supply, in detail under oath, all the testimony which corroborated competely the confession made by Napue. Without Hamer's testimony a conviction of Napue upon his own uncorroborated confession may have been extremely doubtful. Certification to above petition signed and sealed by the Criminal Court Clerk, Vincent J. Poklacki.

Now comes your petitioner and assert that he was denied his Constitutional Rights and they were violated because he was not tried by a fair and impartial jury as guaranteed by section 9, Article 2 of the Illinois Constitution in as much that George Hamer committed perjury by lying and not telling the truth as he promised under oath that he was promised assistance and help by the Assistant State's Attorney, Morris G. Meyers, in having his term reduced for his testimony against Napue. Thereby no one can say how much Napue's Jury Trial enfluenced the Jury unfairly and impartially to impose a Verdict of Guilty and maximum penalty for Murder, and as a result of the perjured testimony of Hamer that enfluenced the said Jury unfairly and impartially, your petitioner was deprived of his liberty, without Due Process of Law and Equal Protection of the Laws, in violation of Section 2 Article 2 of the State Constitution and Amendment 13 of the United States Constitution.

Your petitioner was held by the police at the Detective Bureau, 11th and State Street, for eleven (11) days without being booked, and during the eleven (11) days his mother, his wife; and two attorneys wanted to visit and speak to him on three different occasions, but each time they were rebuffed and told that Napue was not there.

On the same day Napue was forcibly taken by the Chicago Police from Newark, N. J. and brought to Chicago and imprisoned at the Detective Bureau, he was escorted to a room on the fourth floor of the said Detective Building and was handcuffed by the arms and legs to a round back arm-chair. The police began to question him about the shooting of police officer by the name of Patrick O'Malley, who was off duty and in plain clothes drinking in a tavern with some friends.

The police started out by offering him cigarettes and candy and questioned him about the robbery and shooting. When he told them he knew nothing about any robbery or murder, the detectives began to beat and kick him about the legs and face—kicking him with their feet and hitting him in the face with their fists. This went on in about hourly intervals. They would beat him until they got tired, then they would take him back to his cell. He would be in the cell about five minutes, or so it seems, and when he was almost asleep from the tiring and exhausting day and night brutalized grillings, the police would come and get him and start questioning and beating him all over again.

After about the fifth day the police tied him up to the bars of his cell with his hands behind his back and pulled him off the floor so that he would be on his toes, then when he would refuse to answer the questions the way the police wanted them answered, the police would starting kicking him in the stomach and groin. This
41 continued until they took him to the Assistant State's Attorney Office, the office of Mr. Morris G. Meyers, where they also tried to make him sign a confession, but in order to prevent the police from getting custody and beating him again he told the Assistant State's Attorney he would sign the confession if he were first allowed to see his family. After the petitioner visited with his family—he refused to sign a confession that was not made with his free will and did not contain the truth to the best of his knowledge and belief. A confession made with the free will and containing the truth would not take

eleven (11) days in the custody of the police for him to make if he were guilty of the alleged charge.

The Assistant State's Attorney introduced as evidence before the JURY an UNSIGNED confession, which *Napue was coerced into making by hourly eleven (11) day and night brutalized beatings as related in the above paragraphs, and as a result no one can* logically say how much Napue's rights to a fair and impartial trial were denied and violated through unfair influence on the said JURY.

Your petitioner respectfully represents that the Assistant State's Attorney deliberately violated Napue's Constitutional Rights by presenting before the said Jury coerced evidence tending to incriminate him, and thereby Napue's Constitutional Rights as guaranteed by Section 10, Article 2, were denied and violated, and as a result he was deprived of his Liberty, without due process of law and equal protection of the laws, in violation of Section 2, Article 2 of the State Constitution Amendment 14 of the United States Constitution.

42 Your petitioner respectfully further represents that when the Chicago Police forcibly took petitioner from Newark, N. J., to Chicago, Illinois they imprisoned him at the Detective Bureau and kept him there for a continuous eleven (11) days, instead of complying with the command of the Smith Hurd Illinois Revised Statutes, Chapter 38, Section 660. Person arrested to be taken before the magistrate. "When an arrest is made without a warrant, either by an officer or a private person, the person arrested shall, without unnecessary delay, be taken before the nearest magistrate in the county, who will hear the case, for examination, and the prisoner shall be examined and dealt with as in cases of arrests upon warrant." And Smith Hurd Statutes, Chapter 38 Section 664. Warrant, enacts that? "If it appears that such offenses has been committed the judge or justice of the peace shall issue a warrant, directed to all sheriffs, coroners and constable within the state, stating that the offense by name or so that it can be clearly inferred, the name of the person accused, and requiring the officer to

whom it is directed for forthwith to take the person of the accused and bring him before such judge or justice, or in case of his absence, or inability to act, before any other judge or justice of the county and in the same warrant may require the officer to summon such witnesses as shall be therein named, to appear and give evidence on the examination."

Your petitioner was not taken in either case as required by the above statutes before a magistrate, without unnecessary delay, for examination, but was held for eleven (11) days by the policemen so that they could coerce
43 a confession from him, and thereby Section 6, Article 2 of the State Constitution were denied and violated, and Napue was deprived of his Liberty without due process of law and equal protection of the laws, in violation of Section 2, Article 2 of the State Constitution and Amendment 14 of the United States Constitution. Wherefore, it is prayed the court finds in favor of the petitioner and grant him a new trial as may be necessary and proper.

Respectfully submitted,

Henry Napue 16824
Box 1112
Joliet, Illinois

STATE OF ILLINOIS, } ss:
COUNTY OF WILL }

Affidavit

HENRY NAPUE, first being duly sworn upon his solemn oath, deposes and states that he is the petitioner and as such is authorized to make this affidavit; that he is familiar with the contents of the petition, and that the matters, things and exhibits therein set forth are true to best of his knowledge and belief.

HENRY NAPUE.

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for the County and State aforesaid, on the 1 day of August A.D., 1952.

My commission expires December 2, A.D., 1953.

Notary Public

44 IN THE CRIMINAL COURT OF COOK COUNTY

No. P. C. 214

HENRY NAPUE, *Petitioner*

v.

PEOPLE OF THE STATE OF ILLINOIS, *Respondent*

Answer

Now come the People of the State of Illinois, by JOHN S. BOYLE, the duly elected State's Attorney of Cook County, and Robert G. Mackey, Assistant State's Attorney, for the answer to the petition, herein says:

I

THAT the people of the State of Illinois deny each and every allegation of a substantial denial of a Constitutional Right whereby one Hamer testified falsely concerning promises made by Assistant State's Attorney Morris G. Meyers.

II

THAT the People of the State of Illinois deny each and every allegation of a substantial denial of a Constitutional Right concerning a statement made by Petitioner but never introduced into trial, and further deny any remarks made by the State's Attorney concerning said statement were in violation of Petitioner's Constitutional Rights.

III

THAT said petition be dismissed for failure to establish a substantial denial of a Constitutional Right, and further answering say that all issues raised in a former proceeding on a Writ in the nature of Coram Nobis are Res Adjudicata see C. N. 87 Henry Napue and C. N. 55 Hamer are Res Adjudicata.

WHEREFORE, Respondent asks that petition be denied or said petition be dismissed and that petitioner be required to serve out said sentence as prescribed for by His Honor John Prystalski.

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PEOPLE OF THE STATE OF ILLINOIS
JOHN S. BOYLE
STATE'S ATTORNEY OF COOK COUNTY
By, Robert G. Mackey
Assistant State's Attorney

These pages not abstracted because they do not contain any material relevant to these proceedings.

Order of Supreme Court of Illinois Reversing and Remanding Case

Order of the Supreme Court of the State of Illinois on Writ of Error to the Criminal Court of Cook County in Post Conviction No. 214, reversing the trial court and remanding the cause to the Criminal Court of Cook County for further proceedings in accordance with an attached order which contains the following:

"We are of the opinion that the elegations of the Petition with respect to the knowing use of perjured testimony are sufficient to require a hearing. We likewise, are of the opinion that Petitioner is entitled to a hearing on the issue of whether his confession was coerced. The Writ of Error is allowed and the cause is remanded to the Criminal Court of Cook County with directions to conduct a hearing to determine the truth or falsity of these charges."

Not abstracted because these pages do not contain any material relevant to these proceedings.

Report of the proceedings had at the hearing of Post Conviction No. 214, before the Honorable Richard B. Austin, sitting as Judge of said court, on the 25th day of May, A.D., 1956.

PRESENT:

MR. GEORGE N. LEIGHTON,
Appeared on behalf of the Petitioner;

HON. JOHN GUTENECHT, State's Attorney;
for Cook County.

MR. DAVID LEE, Assistant State's Attorney, Appeared on behalf of the People.

Colloquy between court and counsel wherein counsel for Petitioner stated the position of Petitioner with regard to the issues raised by the Post Conviction Petition. The Petitioner was contending that the state used known perjured testimony to obtain his conviction, and that this known perjury is shown by the affidavit of Assistant State's Attorney Morris Meyer as shown in coram nobis petition which was filed in the Criminal Court of Cook County as Coram Nobis No. 55, and is shown by Petitioners Exhibit # 1. A certified copy of Coram Nobis 55 was offered in evidence as Petitioners Exhibit # 2 and the Court reserved

the ruling on the admission in evidence of the Exhibit # 2. Petitioner offered the transcript and it was admitted in evidence as petition Exhibit # 1. Exhibit # 1 is the official transcript of the record of the trial in the case no. 40-939.

HENRY NAPUE, Petitioner, called as a witness on his own behalf, after being sworn, was examined and testified as follows:

Direct Examination

By Mr. Leighton:

y name is Henry Napue.

I am the petitioner. I am now an inmate at Stateville Penitentiary. Post Conviction Petition No. 214 bears my signature. I am referring to the original Petition.

The amended Petition bears my signature. The amended Petition was prepared by me at Stateville Prison.

I was present at the trial and I hear George Hamer testify. I don't know if I can remember everything I heard him say. Using the original Petition to refresh my memory I can tell what George Hamer said to the court and jury at my trial. (The Petitioner then testified from Exhibit 1 concerning the testimony of George Hamer at his trial, which relevant portion of the testimony appears in the Coram Nobis Petition abstracted herein.

47

In the afternoon of the day that Napue testified, I don't remember the date, they brought me to the bullpen and I heard his voice. I hollared over to him and asked if that was him he said yes. I says have they brought you back to testify?

He said yes so I says what are you going to tell them, you know I had nothing to do with that. He said he got 199 years, and I said they must have promised you something. He said, I said I would testify, but I won't say anything that would hurt you. The conversation ended there. About an hour maybe, he took the stand.

I know Assistant State's Attorney, Morris G. Meyers. I saw him in the courtroom, he passed by the cell in that direction, that is towards Hamer's cell. I heard a conversation between George Hamer and Assistant State's Attorney Morris G. Meyers on that occasion.

The conversation between Assistant State's Attorney Morris G. Meyers and George Hamer. And it was before he testified. It was about twenty minutes before he testified that I heard the conversation between Morris G. Meyers and George Hamer. I was about ten feet from where this conversation took place. The conversation that I heard between—Mr. Meyers and Mr. Hamer and the one I
48 had with George Hamer took place in the lockup of the Criminal Court of Cook County. That was the lockup in the back room. I believe that it was the 7th floor. It was in Judge Prystalski's courtroom. I was alone in the cell in the back of Judge Prystalski's courtroom.

I heard Hamer talking to someone. I assumed he was with someone. I did not find out who the other person was. I don't know whether they were witnesses in the case.

I was about ten feet from them, a partition was between us. I couldn't see whether Mr. Meyers went into the cell that George Hamer was in or whether he remained outside. That was because the partition which separates the cells. There are two cells in the particular room where I was in.

This was not the first time I was in that particular room. I am fairly familiar with the layout of that back room. I was in the room closest to the courtroom.

I was in the cell block nearer the door. Mr. Meyers came in and walked past my cell to the next cell. After Mr. Meyers passed I heard only a few words that they spoke. I couldn't say whether they went into the cell or not. I heard only a few words. I heard Mr. Meyers ask him if he was ready. George said well are you sure you are going to do what you said. He said, "don't worry about it, I will do everything possible". He asked George if he was ready and I heard George say, "yes".

When George Hamer took the stand before the
49 jury, Mr. Meyers asked him if he knew Henry Napue

and he said yes. He pointed me out. He asked him what was taking place the night of August, I forget the date. It was August 21, 1938. He said he did recall that night.

And he went on to tell him we were riding in an automobile and came in front of a tavern and stopped. It was true that we were riding around as George Hamer told the court and jury. It was true that all of us got out and went in. While he was in there we started playing dice games with a girl there.

He was drinking. We came out and got in the car again. I had a girl there I met and I went down the street with her. They drove off. They wanted to know whether I was with him and what I did. He said that I was with him. This was not true.

He said I was with him but he didn't remember any shooting or anything. This was not true.

In truth the time in question that George Hamer was testifying about before the court and jury I was walking home with a girl that I was to marry her name was Marie Dowery or something. I believe her address is now 3561 West Ogden. Then Mr. Meyers asked him whether he heard a promise. He said he heard something to that effect. Then Mr. Meyers said, "did I promise you anything".

George told him no sir you didn't. Then he
50 wanted to know if any judge or any state or parole official promised him anything. And he said no they didn't.

This was after the conversation I heard between Mr. Meyers and Mr. Hamer back in the cell. I filed a Post Conviction Petition to which I attached Exhibit # 2. I was in Stateville in the yard and one of the inmates told me he had seen an article in the newspaper concerning me in my case. He said look in the Chicago Daily News.

I got the article and it showed that two ex. prosecutors were trying to get George Hamer something for their obligation for a promise made to him six years before. And in the Petition they admitted the promise was made because of testifying in my case. In the article Mr. Morris

G. Meyers and Mr. David Leeds admitted that without Mr. Hamer's testimony I could not have been convicted. Later I communicated with the Clerk of the Criminal Court of Cook County and as a result I got a copy of the coram nobis by Mr. Morris G. Meyers.

Exhibit # 2 is the Petition of coram nobis which I got from the Criminal Court, Clerk Office. It is certified. I had it in my possession until I filed it with my Post Conviction Petition. I was then an inmate in the Illinois State Penitentiary.

This Petition is in the same condition as it was when I received it. The red lines were put there by Mr. Wallace, the previous attorney in this case. (Petitioner's
51 Exhibit # 2 for identification offered in evidence).

(Petitioners Exhibit # 2 for identification submitted to the Court).

HENRY NAPUE recalled to the stand, having been previously sworn, was examined and testifies as follows:

(Direct Examination Continued)

By Mr. Leighton

In connection with crime described in indictment number 40-939.

I was taken into custody in Newark, New Jersey. I don't remember the name of the arresting officer up there. About two weeks later, I was turned over to the Chicago Police.

I waived extradition. From the station I was taken to the Detective Bureau at 11th Street. I think it was on the fourth floor and I stayed there a while and they took me back to the first floor.

It was the same day in the evening about six o'clock. The officers there told me not to worry they wouldn't bother me. There was one officer there I think. I don't know his name. I could not identify him if I saw him again. I can't recall the exact date I arrived in Chicago but it must have been after the 11th. I arrived in Chicago on or about the 13th day of June 1940.

I was put in a bullpen for a while and three other officers came later and took me to a little room. They took me on the fourth floor. This was about six thirty
52 P.M. I remained in this room with these three officers about an hour. I remember only one of them whom I can identify by a scar on his face. His name I don't know. One other was Sargeant Franks. The other officer told me he was Officer O'Malley's brother he used some bad language at me.

He laid his gun on the table and he said, "you little dirty son-of-a-bitch I ought to kill you. That was my brother". He was referring to me. His brother was the officer that was killed imagine. Then they put me in a chair and handcuffed my arms and legs to the bottom. I was handcuffed to the chair. The fellow with the scar on his face, I believe was the one that did it. So many were there. I believe it was the one with the scar on his face that did it. He came over and told me to sit down and he put handcuffs on me and bind my legs and the one in-front stood and asked me questions. I stood there in that position for about an hour. They told me the day it was suppose to have been committed. They told me the day it was supposed to have been committed and they told me the name of the men who were supposed to have participated in the crime. After the hour they took me to the bullpen and locked me up for fifteen minutes and brought me right back again. These were the same officers in the same room. They took me back and forth in fifteen and twenty minute intervals. I remained in the room
53 about the same length of time, about an hour. That is when they started to rough me up a little. To be exact, Sergeant Franks asked me how did I enter the place and to tell him everything I knew. I told him I didn't know and then he hit me in the face and said, "you are a lying son-of-a-bitch, you know all about it." This was the officer with the scar on his face. He hit me with his hands on the left cheek. After he hit me, I felt my head go back against the wall. I told him I didn't know what he was talking about. He told

me, "you know alright". He says, "you're going to tell us, or we're going to kick the shit out of you" the officer with the scar on his face said this. They kept going around with questions I stayed there about an hour and a half. Then they took me back to the lockup in the fourth floor where I was.

I laid down for a minute and was pretty tired and in about an hour they came back on the second shift and got me. They were not the same officers. I didn't know them at all. I didn't see them at my trial. They came to the lockup. They talked to me through the bars and one of them told me to open up I still told them I didn't know what they were talking about. They took me back again. When the other crew came they started the same routine. Officer Franks, the officer with the scar on his face and the officer who said he was officer O'Malley's brother. It was in the afternoon of the day after I arrived in Chicago.

It was about three o'clock. I stayed about two hours maybe three in the room. Officer Franks questioned
54 me. He told me I knew all about what happened and for me to tell him. He said these fellows wouldn't bother me. He said this other fellow who was hitting me wouldn't bother me.

By other fellow I mean the one with the scar on his face. When I told him that I wouldn't this officer hit me grabbed me and said, "don't bother, he will come clean". Sergeant Franks said that. Then he stepped back and said, "I want to kill this son-of-a-bitch" the officer with the scar on his face said that. He didn't bother me and Sergeant Franks asked me questions and this guy who said he was Officer O'Malley's brother would slap me and ask me questions and Officer Franks had me, and I couldn't say anything. They had me from one to the other. This took place maybe two hours.

Then they took me back in the lockup. I believe it was close to dark. This was the next night after I arrived from New Jersey. I stayed in the lockup about an hour and they came back and took me to the same room. This was the same group of officers. They took me to the Gun

Bureau. They got me in there handcuffed me down again. This fellow with the scar on his face said, "you are going to tell us what happened". They threatened to throw me out of the window. They raised it and I could see a lot of cars down. Officer O'Malley put his gun back on the Bureau and said he would shoot me and he would say
55 that I tried to jump out of the window. The officer who said he was Officers O'Malley's brother said that. I don't know how long this took place in the room this time. It got so I could hardly judge the time at all. I was tried and lost sleep and lost track of time because I was weary. In June 1940, I was 23 years of age. I was born in Manhattan, Kansas. I went to school part in Kansas and part in Chicago. I went to first year in high school. I did not finish the first year. I had at that time never been arrested for a felony. I had prior to that time never been subjected to that type of interrogation.

On this day when Officer O'Malley's brother said he ought to shoot me, I was there quite a while. They took turns. Two stayed with me and two would go out and eat and come back then the other two would go. Maybe I was there two and a half hours or something. Sergeant Franks beat me up pretty bad that day. He beat me with his hands and knees. I was handcuffed and kicked in the side. I have marks on them now where they kicked me with their shoes on my legs. I have marks on my knees.

I have marks on both legs. The marks are still there. (Witness demonstrated to the court the marks on legs indicating for the record marks on left side of the right leg and discoloration just below the midline of the right calf. And the witness indicated a spot that was the mark resulting from shoes struck on his legs).

These bruises have been here all the time. After they questioned me in this room Officer Franks came in
56 he told them not to bother me. They went out there and talked to me and asked if I were hungry. I said my mouth was sore and I couldn't eat. He said, "look, kid, you can trust me. You tell me all the part you played

in this here and these people won't bother you", I said there is nothing to tell. . . . He got mad.

I answered these questions after Officer Franks said they won't bother me anymore. By that time, I had been held at the 11th Street Station the fifth or fourth day.

Between the day when I got to Chicago from New Jersey and when I made the statement I had not been taken to any Judge or Magistrate. They had not shown me any warrant for my arrest.

I believe it was eleven (11) days that I was at the 11th Street Station before I came over to the State's Attorneys Office I was not taken to a Judge on that day, I was taken to the State's Attorneys Office. The first time I was taken to a Judge it was maybe a month. The name of the Judge was Judge Prystalski, Chief Justice: I say that it was about eleven (11) days or so that I was taken to Cook County Jail. When they first took me to the Cook County Jail they wouldn't take me because they had no papers on me. They took me back to 11th Street and I stayed there maybe two hours then they brought me back to the County Jail and put me in.

Between the time I got to Chicago from New Jersey and
the time that I had been taken to the County Jail I
57 had not seen any member of my family. I had not received any communication from my family. In the conversations with Officer Franks and the other Officers, I asked for an opportunity to communicate with a member of my family or a friend. The first time I made this request of any police officer was after I got tired of the beating and everything. I told them if they would let me see my mother and lawyer, I would tell them anything because I couldn't stand the beating anymore. That was on the 11th day the same day they brought me to the State's Attorneys Office.

I told them to let me see my mother and my lawyer and I would sign it because I couldn't take the beating.

He said, that is Officer Franks, that I should have said that before and there would not have been any trouble. I was examined when I got to the Cook County Jail. I

don't remember the name of the person who examined me. I think it was a prisoner who examined me.

They looked around and made me strip. I did not show them the bruises and scars on my legs because they were examining and I was hurting. I thought they would see them and I thought it was not necessary. I was hurting on the face, stomach and groin, down here. I didn't show it to the person examining, I was new and I did not know what was going on. I didn't know I was supposed to do all this. My jaw was hurting. That was caused by the blows I was taking.

58 The blows were by the police officers. The first time I saw a member of my family or some friend was when I went to Mr. Meyers office and they said that the confession was made. They promised to let me see my family if I would sign. He said to bring them in. They brought in a lawyer, my wife and mother. My wife's name is Marie Napue. I had been married about six years.

On August 21, 1938, I was living with my wife. The room which the lawyer, my wife and my mother were brought in was the basement of the Criminal Court Building. I talked to my wife, my mother and the lawyer. The conversation was in the presence of the Assistant State's Attorney. The conversation I had with my wife, my mother and the lawyer was at first, the lawyer wanted to know whether I had made any statements. I said they forced me to make them and he asked me if I had signed any statement. I said no. I think he asked Mr. Meyers what did they book me for. Mr. Meyers said I had not been booked. I believe he got on the telephone and called Mr. Attorney Gutknecht Courtney I couldn't make out what they were saying and my lawyer gave the telephone to Mr. Meyers. Between the time I got to Chicago from Newark, New Jersey, I couldn't count the times I was questioned by the Police Officers of the City of Chicago from Newark, New Jersey, I think I was questioned three times until twelve o'clock at night. I got a little rest and they came back

after midnight and questioned me again. That was
59 four or five times during the first night. The second night they took me to the showup about four times, and nobody pointed me out and they brought me back and started questioning me again.

That went on four or five times. The next morning I went to the showup again. I made three or four showups and nobody fingered me and they constantly questioned me for the third or fourth day. All together I imagine they questioned me five or six times during that day. During that period of eleven (11) days I saw Officer Franks approximately every day. Everytime he came to work I got a chance to see him. I didn't see the Officer who said he was Officer O'Malley's brother regularly. I paid more attention to Officer Franks because he was directing most of the questions to me.

I saw the Officer with scar on his face during that period. While at the 11th Street Station, I saw the Assistant State's Attorney Mr. Meyers, that was when I first told him I would sign anything but to let me see the people.

I didn't know when I was answering the questions that I was incriminating myself. I gave those answers because I got tired of pushed kicked around. I said no, no, and they kept pounding and I had to say yes.

I couldn't take it forever. At the trial before Judge Prystalski in August of 1940, I heard Officer Franks testify. I heard Officer Franks testify that no one had laid a hand on me.

During the course of my trial, Police Officers
60 testified that I had admitted to them orally that I had committed this crime. They said I made a confession to my part. When they spoke of the confession, I imagine they were referring to when they were trying to get one out of me at 11th Street. They did not use any confession in my trial.

All they said was I made a statement to my part of the crime. I did not see a confession. I had not signed a document of any kind. There were I believe three officers that testified before the Court and Jury, telling the Court

and Jury that I had confessed to my part in the crime. These three were the same three that had me all the way through. Officer Franks, the man who said he was Officer O'Malley's brother and the man with the scar on his face.

In the month of August 1938, I lived at 1818 East Illinois Street with my mother-in-law and wife. On August 21st, I had gone to a certain tavern with George Hamer at Oak and Sedgwick on the North side.

After I left the tavern I came out with this girl that I married. We had a little argument. I went over to the alley and talked to her and we made up again. We started to talk and walk to Orleans Street going East from the tavern. I went home with her. When I say home I mean 1818 Illinois Street. That was maybe two o'clock or one thirty in the morning. When I left the tavern I left all the fellows in the car. There was Howard Poe, George Hamer was still there inside. Between the period when I left the tavern and approximately six o'clock in the
61 morning I saw Howard Poe at my house, early in the morning.

My wife and mother-in-law and brother-in-law were there. I had a conversation with him. There was something unusual, that is he said a roomer of mine George got shot and he wanted to take him to a doctor. I said take him to Cook County Hospital he said he didn't want to.

He said he was in the car. I put on my jacket and went down. I looked in the car and went around to Dr. Steinbergs. I got in the car and went around to Dr. Steinbergs at Oak and Grank Avenue, and Rush. I told him there was a fellow that got shot shooting dice. He examined him and said this man is almost dead. Howard Poe was standing in Dr. Steinbergs office with me. In this conversation there was present my wife.

We were living with my brother-in-law, wife and mother-in-law in the same building. My mother-in-law is down at 606 North Clark Street. My brother-in-law stayed in the same building, I believe.

Cross Examintation

By Mr. Lee:

The name of the party I was with on the night the crime was committed was Marie Dowery that is Napue now because she is my wife. She married somebody I don't know her present address. I think it is 3561 West Ogden.

Mr. Leighton: Mr. Lee, we will produce her.

I don't know her name at present.

(Page 425) Copy of indictment in case number
62 40-939, Criminal Court of Cook County, returned in June Term by the Grand Jury of Cook County, filed in the office of the Clerk of the Criminal Court of Cook County on June 18, 1940, as Exhibits Number 3, 3A and 3B).

No objection made to the offer and the exhibits were received in evidence. THE COURT: Ruling of the Court on Exhibit Number 2, the Affidavit of Mr. Meyers in the Coram Nobis proceeding.

Petition Number 2 received in evidence. Petitioner rests. The People, respondent, to sustain the issues in its cause, call the following witnesses:

JACOB LEITZEN

was called as a witness on behalf of respondent, and having first been duly sworn was examined and testified as follows:

Direct Examination by Mr. Lee:

My name is Jacob Leitzen; I am a Police Officer at the 19th District at present.

My Star Number is 161 I was a Police Officer in the month of June 1940. I was assigned to 11th Street Station in the month of June 1940. During that month I had the occasion to see the Petition of Napue. The circumstances were that I was working with Officer Frank Burgess and Walter Payne. We went to the Railroad Depot to bring in Napue who was brought back by two other officers.

The first time I saw Napue he was with Officer Payne and Burgess. Officer Payne is now in Florida. Officer Burgess is deceased. We took Napue to 1121 State
63 Street. There were no other Officers present, just the three of us. Officer Morgan was with him. I saw him during the next twenty-four hours, I saw him frequently. At anytime, I did not see him struck.

I saw him in the gun room in the fourth floor. I helped bring him in that room during the first twenty-four hours. I was in there a few minutes. When we brought him out again we returned. This was during the course of two or three days.

Q. How often did you take him back and forth the first day, the first twenty-four hours?

A. I couldn't tell you that.

Q. Well, I am trying to limit my questions first. There are eleven (11) days involved and a long period of time . . . I couldn't tell you what officers remained in the room when I left. We placed a guard there. Maybe an officer or two were there who knew who these officers were, I couldn't tell you. I do not know the full name of Officer Frank. Frank was the last name. I didn't know the first name. I couldn't tell you where his present whereabouts are. I do not know the officer referred to as the brother of the deceased Officer O'Malley.

I do not know the name of the Officer who was referred to as having a scar on his face. I couldn't tell you how many days Napue was at the 11th Street Station after I brought him there the first time. I recall Napue's
64 physical condition when I saw him being taken back and forth. He was okay. He looked all right, all right absolutely.

I did not see any visible marks upon Mr. Napue to indicate that he had been injured or struck or hit.

During the month of June 1940, I saw him every day in the building because we handled the case.

I heard some of Napue's testimony.

Officers present in those days with Napue were the two Officers I worked with, Officer Franks and I think Captain O'Malley. He is still living.

Cross Examination by Mr. Leighton:

I knew at that time an Officer Edwin O'Malley. He was one of the investigating officers in the alleged murder of Patrick O'Malley. I couldn't tell you if I saw Edwin O'Malley in or about the 11th Street Station when I brought petitioner back from New Jersey on the June 11th about 6:30 P. M.

Burgess, when he was brought back. Took him to room 402 in the Police Station.

That was the Homicide Room. I remained in this particular section with the petitioner and I on that occasion were two officers I worked with, and Officers Morgan, and a few others that were in the Homicide at that time. I couldn't tell what time I worked on that day, I think it was four to twelve.

65 We got the case right from the beginning. The case began August 1938. After he was taken from room 402, he went to the Gun Section. I went with him, so did Officers Payne, Burgess and maybe Morgan.

They had a lockup off the room there. He stayed overnight after we left him there. I went back to room 402. I saw Napue the next day. By the Gun Room is a lockup. After we left him, he stayed there because no one was to take him out.

I was one of the Officers with the authority to take him out. We were assigned to the case. By "We", I mean Officer Walter Payne and Officer Frank Burgess. Walter Payne and Frank Burgess worked together. I know an Officer named Walter Franks of the 37th District. I couldn't tell you whether I saw him at the station the day petitioner Napue was brought back from New Jersey. I was not the Officer in charge of the Gun Room during the twenty-four hour period.

I couldn't tell you who was the other Officer who had a key to the lockup. I went home during the twenty-four hour period, someone else had to keep the lockup. I don't know whether someone else let him out.

It was possible for some other Officer to open the lockup and let him out. I cannot tell how many days he was at

the 11th Street Station. It was more than two days because on June 13th, he was present when we took a
66 statement from Dr. Steinberg. The Police Department of Chicago has a record of when he got there and of when he left. I don't remember the approximate number of days I saw him. I came back on duty in the morning about ten or eleven o'clock.

I did not take part in the questioning. Walter Payne and Frank Burgess did most of the questioning. Frank Burgess is deceased. They probably asked the petitioner a few questions the evening of June 11, 1940. I have a yellow sheet of paper.

It was written about two years ago when he came up for a hearing. I got the information from the files of the Police Department. I looked at those records. It is in my handwriting. I was working as a Police Officer.

I did not at anytime that the petitioner was there, strike, beat or kick him.

The petitioner arrived in Chicago on June 11, 1940. The statements I refer to, June 13th statement of Dr. Steinberg we have one copy on file in the Homicide. Dr Steinberg made the statement in the presence of Napue. Napue made no statement in the presence of Dr. Steinberg. Dr. Steinberg was being questioned by the Police. I witnessed the statement.

I know there was an Officer O'Malley working on the case.

(Witness Excused)

MORRIS MEYERS, called as a witness on behalf of the respondent, and having first been duly sworn was
67 examined and testified as follows:

Direct Examination by Mr. Lee:

My name is Morris Meyers. I was the Assistant State's Attorney at the time Mr. Napue was tried. I believe George Hamer testified at the trial of Mr. Napue. I did not at any time ask him to testify falsely at the trial of Napue.

I have a recollection of talking to George Hamer prior to his taking the witness stand in the case. My recollection is I did not talk to him in the bulpen. I talked with him in one of the ante rooms in back of the court room. I had a brief conversation in that room. Napue was not present during that conversation.

He was not present. The doors were locked. I don't know whether he could have over heard or not. I don't know where Napue was except he was in the custody of the Sheriff. I did not ask George Hamer to testify falsely. George Hamer testified under oath. Prior to his testifying, I talked to him. He said, "Hello". I asked in substance if he was prepared to testify consistent to the statement he had made to me several days after the shooting and killing of Officer O'Malley in August 1938, then you go out there take an oath and tell the truth. He took the oath and testified to substantially what he had told me on August 27, 1938. The statements I took from Hamer, were in the presence of a Doctor and a Court Reporter. I made some notes of it in my trial
68 book. He told me he had participated in the attempted robbery and he told me who had participated with him. He specifically mentioned Townsend, Henry Napue, Lucius Webb and Howard Poe. I took notes in my handwriting in my trial book. My book would show. That statement was reduced to writing and taken over to the Bridewell by Officer Higgins, Sergeant Bill Higgins who was connected with the Sheffield Avenue, the Station where the shooting occurred. I was not present when the statement was read to Hamer, but the statement was brought back to me containing Hamer's signature to every page and on the last page. Hamer testified at the trial of Henry Napue in substance exactly what he had told me in the Bridewell Hospital. I was present in court during the trial of the accused, every minute of it.

I was the trier of it. I was the representative of the State in that trial. I believe Hamer related the circumstances of his being taken to Dr. Steinberg's office. My recollection is that he was shot in the tavern. He was an

unwilling participant in the attempted robbery. His friends dragged him out of the tavern and took him to Dr. Steinberg's office.

(Objection to the question sustained as not responsive to to original question)

I did not enter a room having two small cells.

Q. Do you recall hearing George Hamer saying to you, "are you sure you are going to do what you said?"

A. George Hamer may have said something like
69 that in substance, and I think my response to him was that I would keep my word, that I had given back in 1938, to the effect that if what he had told us about being a reluctant participant was borne out, that is if the truth was borne out, after the other participants in the murder were apprehended, that I would direct that matter to the proper authorities having jurisdiction over him for them to do whatever they wished. And I think that is what he meant and I think I responded to him in that vein.

Q. Had you made some sort of promise to him in connection with helping him to get his sentence reduced?

A. No, sir. Never, I told him exactly what I had related here after he had been indicted for the murder and just before he was tried before the Judge who was trial Judge, he waived the jury and my recollection is now after 16 years, that I told him since he was insisting that he was a reluctant participant and since he did give us all the names of the others and since we wouldn't have gotten the information any other way, that I know of, that if when we apprehended Poe, if and when we apprehended Napue and if when we apprehended Webb, that if they substantiated what he told us as being the truth, that the matter would be directed to the proper authorities having control and jurisdiction over his person. For them to do anything they wished to do about it. In other words, I had no authority to make any promises. I was
70 just a lawyer not a judge.

Q. In other words, your efforts to help Hamer or thoughts that you might want to help him would be because he was reluctant if you—

Mr. Leighton: Object to the form of question.

The Court: He hasn't finished it yet, and I don't understand.

Mr. Lee: I am attempting to clarify the points here.

Q. Did subsequent matters indicate to you that Hamer actually was a reluctant participant in this crime?

Mr. Leighton: Objection to that.

The Court: What is the basis of your objection?

Mr. Leighton: To the form, Your Honor, to something to which the witness has not testified.

The Court: Objection is overruled and in view of your Exhibit #2.

The Witness: Yes, my answer to that is that there were things that happened subsequent to that. The next person to be apprehended following the apprehension of the arrest of Hamer, was Howard Poe, I took a statement from Howard Poe. A full and complete confession was made by him in which acknowledges, which he himself named the participants, named Napue, Webb and Townsend that was reduced to writing and indicted and tried before a jury before His Honor Judge Bolton. The jury returned a death penalty. The Supreme Court of Illinois to my recollection denied a supersedeas,

71 Mr. Leighton: Objection.

The Court: Objection sustained as to the—

The Witness: And—

Mr. Leighton: Further objection, Your Honor. I move that the answer that this witness gave to any confession that he took from a man be stricken.

The Court: Had you made the objection at the proper time, I would have sustained it. He has answered and which was given.

The Witness: May I proceed?

(The Court then sustained objection to further answer by the witness.)

Mr. Lee: Q. At the time of Napue's trial, had you taken any steps to help Hamer?

A. No, absolutely not.

Q. Did you intend to?

A. I didn't intend to help anyone in the sense that Hamer or anybody else, in the sense that I could help him. I only intended to keep my word as I gave it to him. That is after I was satisfied, that what he had told me originally was the truth, that I would direct that to the attention of the people having control over him to do what they saw fit.

Q. You say you gave him his word? What was the word you gave him?

72 A. I told him that if what he was telling me if it were the truth that he was a reluctant participant in this attempted robbery and resulting murder of Officer O'Malley, that he did not, that he did no shooting, did not shoot at Officer O'Malley or anybody else in the tavern, that if that were borne out by the others, if and when they were apprehended, Poe, Webb and Napue, that I would then direct that to the attention of whomever had him in custody, meaning the Governor or Parole Board or anybody else or any Judge. And let them take—

Q. Did you at anytime thereafter make any affirmative action to carry out your promise to Hamer?

A. Yes; I did. After the trial of Webb who was the last one apprehended and tried and convicted.

Q. What did you do?

A. I filed a petition in Writ of Error, Coram Nobis on behalf of Hamer. He wrote to me from the Pen and I replied to, to his letter and I filed such petition with the Clerk of the Criminal Court of Cook County seeking to direct the Court's attention to the matter that had occurred.

Q. Do you remember what year?

A. I think it was in '42 or '43 or '44. It was after I had—

(It was then stipulated by both parties that petitioners exhibit #2 is the copy of the Writ of Error Coram
73 Nobis filed by the witness on behalf of George Hamer.)

Mr. Lee: Q. Is this the basis of your assisting Hamer that he had testified against Napue?

A. Absolutely not. You mean trying to assist him? My attempt to assist him?

Q. Yes.

A. It was not.

Q. Your attempt to—

A. It was not, because he testified against Napue at all.

Q. Did you set forth in your petition the reasons why you were attempting to assist Hamer?

A. Yes, I did, and I probably used some language that I should not have used. In my zeal to do something for Hamer whom I felt then and now entitled to some help from the State of Illinois, I felt a moral obligation to him then and I still feel that obligation.

Q. Had Hamer been promised a reduced sentence if he would testify against Napue?

A. Not from me. I couldn't promise him that. I wasn't the Judge.

Q. Did you knowingly use any perjured testimony against Napue?

A. Absolutely not.

I believe I took a statement from Napue when he was brought from the East by one of the Officers connected with the Chicago Police Department. I don't recall the
74 date. It was sometime prior to his trial, in the Spring or Summer of 1940, because he went to trial in August.

At the time I took the statement I saw no bruises or marks on his body that I was able to observe. He made no complaint about mistreatment by anyone. He did not remove any clothing in my presence nor make any complaint about mistreatment by the Police or anyone else. He made no statement in my presence about blows administered by me or anyone else upon his person.

Cross Examination by Mr. Leighton:

Q. I was the Assistant State's Attorney who had requested the return of George Hamer as a witness. I had questioned him soon after the alleged crime. I had represented the state in prosecuting George Hamer.

I said that in the statement I had took from him Hamer had said he was an unwilling participant in the robbery. He said he was coerced, intimidated or freightened into taking part by the other members of the group. He mentioned Poe as the toughest member of the outfit. In substance the statement that I took from Poe and the statement I took from Napue in some degree, indicated that Hamer had told me the truth about that.

Q. So from these various sources or corroboration you had ascertained prior to the time you had testified in this trial of this petitioner, that there was some truth
75 that he had said he was not a willing participant?

A. Of course at the time he testified against Mr. Napue, the only other person making statements was Poe in addition to Napue. And that was my original source of information about the truth or falsity of Hamer's statement and I recall—I don't have the statements in front of me, I don't have it. My recollection is that both Poe and Napue and later Webb who I did not question but was told substantially, substantiated to a degree the fact that Hamer was coerced into taking part in this attempted robbery. I don't know where the statement is I took from Napue. He signed it I think.

The statement was introduced into evidence and read to the jury.

Q. A statement in writing?

A. Yes.

Q. Signed by Napue?

A. I think so, that is my recollection.

The statement if it were signed in the State's Attorney Office. The statement was taken in shorthand and reduced to writing. That was the practice at that time to read the statement onto a cylinder and then have a stenographer or typist type out the statement from hearing what the

cylinder had to say. Then the statement was transcribed brought in and read to the person who made it, and he was allowed to make corrections and affix his signature to each page and the last page. Now whether Napu actually signed this statement or not, I can't be
76 too sure because it was such a long time ago. I would have to see the statement.

Q. Mr. Meyers, I hand to you what is a transcript of the trial of Henry Napue before Judge John Prystalski which began on August 12th, 1940, in Case No. 40-939, and ask you to examine it and find in that record where there is a written confession entered into evidence as an exhibit entered by the State.

(Witness Examining Document.)

The Court: Counsel, the hour's late and a long record. And I guess you and I and Mr. Lee all know the futility of—can't it be agreed that there was no written statement introduced in evidence and—

(Witness concedes that no written statement was taken from petitioner, and his statement to that effect was withdrawn)

After Hamer testified I don't know whether I communicated with Parole Authorities to ask them to do something about his sentence. I wrote some letter to Hamer and he kept writing to me I tried to keep my word to the man. I thought he was entitled to consideration and I still think he is. After the last man, Webb, was apprehended and tried I was not an Assistant State's Attorney then, I always felt a moral obligation to Hamer. The basis of the moral obligation was my word to Hamer.

My word was that if he was convinced after hearing from Napue, Webb and Poe, that what Hamer had told
77 me about his being an unwilling participant in the attempted robbery, I felt because we would never had known about the case without his full disclosure and cooperation with the police, he was entitled to consideration if he were telling me the truth. This moral obligation

was not formed in my mind, until after Webb was tried and convicted. Prior to the time Hamer testified against this petitioner I had not told him I felt this moral obligation.

Q. Were you still Assistant State's Attorney of Cook County when the basis of this moral obligation first came to your attention?

A. No, sir, I was not.

The only times I talked to Hamer prior to his testifying, in the Napue case was when I took the statement from him in the Bridewell Hospital on August 27, 1938 and possible just before his trial, before Judge Fardy and maybe immediately afterward. That is all. That is my recollection. I did not go to the State's Penitentiary to interview him. I never communicated with him about testifying.

He never said to me that he would not testify unless an assurance was given him that he would be assisted in reducing his sentence.

Q. Did you ever discuss with him as a condition for his testifying against Napue, the possibility of having his sentence reduced.

A. Not that way, Counsel.

78 Prior to his testifying, as I stated before, he made some mention of what I had told him before he was delivered to the Warden of the Penitentiary after he was convicted about whether I would conform to what I had told him. I said, "George", or whatever words I used, "if I am satisfied that you are telling the truth, after we have apprehended everybody else that is involved in this case, I will direct it to the proper authorities and let them take whatever action they see fit." And that is what I told him, and that is what I tried.

Q. This was when?

A. Just before he testified.

Q. 1940?

A. I told George Hamer then in 1940, In August of 1940. At that time I already had a confession from Howard Poe. At that point, I had the corroboration of Howard Poe, as to what George Hamer had told me. I

had obtained some information from Napue that further corroborated George Hamer. Napue told me something about the fact that Hamer was a reluctant participant.

I resigned from the State's Attorney's office in May 1941. I don't recall with any certainty whether I communicated with any of the authorities, with regard to the senses of George Hamer before I resigned as Assistant State's Attorney in May of 1941.

79 I did not see the confession given by Webb. I was told about it by Dave Leeds, the Assistant State's Attorney who prosecuted Webb.

I talked with George Hamer the day he came to testify against Napue, for a few minutes.

Q. Had it ever come to your attention at anytime that Hamer refused to testify against Napue?

A. He never told me that nor did anybody else tell me that. I don't recall any such information coming to me. When Hamer swore to tell the truth in the Petitioner's trial his testimony had no relation to any inducements or promises of his sentence being reduced, no promise from me. I had told him that I would direct the attention of the proper authorities to his case. If I were satisfied that he were telling the truth.

I didn't make any promise at anytime. The time he testified he said something about wanting to know whether I would conform to what I had told him back in '38 and I repeated it again. He had testified once before under oath and he was about to testify again under oath which would indicate to me whether he was telling the truth in addition to other things. And I told him that after all of the people involved were apprehended and I was satisfied that he told me the truth, it would be directed to the attention to those people who would do something about it, if they wished to do it.—

Q. Now when he did testify, you asked him, did
80 you not, before the Court and Jury, whether any—

The Court: Reading from exhibit #1—I think that is stipulated that those are the questions asked him, but whatever they show asked by Counsel.

(Petitioner's exhibit #1 is the transcript of the trial of Petitioner, Henry Napue in the case People of the State of Illinois vs. Henry Napue, Case No. 40-939, Criminal Court of Cook County before Judge John Prystalski, which began on August 12, 1940, which trial is the subject of the Post Conviction herein. Petitioner's exhibit #1 is not abstraced in this record, because the relevant portions of said exhibit are included elsewhere in this record.)

I did not communicate in writing to the State's Attorney of Cook County concerning the moral obligation I felt about George Hamer. I might have talked to Mr. Tuohy who succeeded Mr. Courtney as State's Attorney, and I may have talked to Mr. Bole who succeeded Mr. Tuohy. Either I or Mr. Leeds had taken the matter up with either one or both of these gentlemen.

It might have been necessary to pay a filing fee for the Coram Nobis Petition which I filed on behalf of George Hamer, petitioner's exhibit #2. If so, I paid it.

I did not receive any money from George Hamer. I did not receive any check from the Illinois State Penitentiary made payable to me under the direction of George Hamer.

No friend or relative of George Hamer came to me to
81 pay me for filing the petition. I was not associated with Mr. Leeds in the practice of law at the time I prepared this petition.

(Witness excused.)

BENJAMIN MORGAN, called as a witness on behalf of the respondent, having been first duly sworn was examined and testified as follows:

Direct Examination by Mr. Lee:

My name is Benjamin L. Morgan, I am employed by the City of Chicago in the Police Department. I've been in the Police Department 32 years. I was an officer in the Police Department in June 1940. I made a trip to New Jersey and brought back to Chicago Henry Napue on June 11, 1940. Officer Payne, Officer Litson, Byrne, Wrigley and Davis met me at the LaSalle Street Station when I

rrived with Napue. We arrived about six thirty in the vening.

When I got to the 11th Street Station, I was tired I hecked in and went home. I saw Napue the next day in he morning about nine thirty or ten. That was June 2, 1940. Officer Litson, Brown, Payne and I took him to he 26th and California to the office of Assistant State's Attorney Meyers, Mr. Morris Meyers. We arrived there about ten thirty. He was questioned by different ones there in the group. I don't remember what was said word or word.

Questions were asked of him and he made answers. On the night of June 11th I did not see any marks or 2 bruises or cuts on Mr. Napue. I did not see anyone threaten him with a weapon or instrument. I don't recall any officer who participated in questioning Mr. Napue who had a scar on his face. After a statement was taken from the defendant, we went to the scene of the crime where it was re-enacted. Napue re-enacted the crime.

Officer Bryne was present during the questioning.

Cross Examination by Mr. Leighton:

I don't remember the hours I worked on June 12, 1940. I was working days when they sent me on the trip to bring Napue, the day following my return to Chicago with Napue I took Napue the petitioner to the office of the State's Attorney. It was between nine thirty and ten in the morning. We remained in the office of the State's Attorney the biggest part of the day. It was in the afternoon that we left the office of the State's Attorney, I couldn't fix the time to be exact. Because it has been a long time.

The petitioner asked to see his wife. I don't remember the time or the day he was allowed to see his wife. I don't remember whether his wife was alone or with someone.

The statement was transcribed and brought in for his signature. They gave him a copy of it. Two or three of

the fellows had a copy and everyone read the statement there.

There were one or two changes. He signed it in
83 my presence. Officer Payne, Officer Litson, Byrne and I believe Lieutenant O'Malley and I were present when the statement was signed. I don't recall overseeing the written statement again. I was a messenger in the case that is all. I was at the trial.

I am not sure that I saw or heard about the written statement I am referring to. I believe it was mentioned. Something said about the statement. I saw the defendant the day following June 11th. We made a second trip to the State's Attorney's office. The trip was to have him sign the statement. On the following day he signed the statement.

The next day after the 12th I took him back to the State's Attorney's office for the purpose of signing the statement. On that occasion, Lieutenant O'Malley, Officer Payne, Litson, Byrne and myself were there.

The State's Attorney was there. I don't remember who told me to take the petitioner to the office of the State's Attorney for the purpose of signing the statement. Someone higher up told me to do it. When I brought him back on the 13th, he signed the statement. It took quite a little while to sign his name on each page of the statement I then put him back in the cell until such time as he was booked.

I don't know when that was. I was in Felony Court when he was brought in for examination. I can't say when that was with the relation to the date that I brought him back from New Jersey. It wasn't too long. One or two days after. The petitioner was there I was there.
84 I don't recall who the Judge was sitting in Felony Court. Nobody called the name of the Assistant State's Attorney in the Felony Court. There besides me was the Police Officer, Lieutenant O'Malley, the deceased Policeman's brother, Payne, Litson, Bryne and myself. It happened before we went to the Grand Jury. We went from there to the Grand Jury. I don't remember the date

The indictment was returned on June 18, 1940. I went to the Felony Court with the Petitioner before then. Officer O'Malley was there, Lieutenant O'Malley was there. There were two O'Malleys.

The deceased name was O'Malley and he had a brother on the job. The Officer, Patrolman O'Malley, was the brother of the deceased. Lieutenant John O'Malley was no relation. (Counsel for Petitioner offered to show to the witness that there was no Felony Court Hearing on June 18, 1940. Witness insisted there was.).

The deceased had a brother Officer O'Malley on the job, I didn't know his first name.

I know that the decedent's brother, Officer O'Malley was on the job, and I saw him the day I brought petitioner back from New Jersey he was one of the Officers on the case.

He didn't testify, he didn't do any investigating, naturally being his brother he was interested in the case. The day I brought petitioner back from New Jersey, I saw in connection with his interest.

85 In what was being said and done I believe he was present at the time petitioner was questioned. After I brought the petitioner back and locked him up in the 11th Street Station, I went home and got some rest.

I saw him the next day. Officer O'Malley, the brother of the decedent was there or showed up later on he was present during part of the questioning in the State's Attorneys office on June 12th. I don't know the exact number of days the petitioner stayed at the 11th Street Station before he was turned over to Cook County Jail Authorities.

Re-Direct Examination by Mr. Lee:

I don't recall seeing Patrolman O'Malley present the morning of June 12th prior to taking Mr. Napue to the State's Attorneys office. Patrolman O'Malley could have been at 11th Street on the night of June 11th, 1940. I didn't know who he was until somebody at the State's

Attorneys office said that he was the brother of the deceased.

The first time I knew that he was brother of the deceased was at the State's Attorneys office. (Witness excused)

John J. O'Malley called as a witness on behalf of the respondent, and having been first duly sworn, was examined and testifies as follows:

Direct Examination by Mr. Lee:

My name is John J. O'Malley, my address is 622 Arlington Place, Chicago, Illinois, my present occupation is Attorney. I am related to Officer O'Malley of the Chicago
86 Police Department who was killed in August 1938. He was my brother. His name was Patrick Edward. (Witness testified that he was brother of the Police Officer who was killed on August 27, 1938 and that one of his brothers William Francis O'Malley was also a Police Officer of the Chicago Police Department in June 1940. That William Francis O'Malley is not working at Elcajon, California. His present address is 2100 DeHesa Road, Elcajon, California.)

Cross Examination by Mr. Leighton

During the period between August 1938 and June 1940 I had occasion to talk to my brother William Francis O'Malley concerning the investigation into the incident involving my other brother who was killed in the service. I was then 25 years of age. (Witness excused)

(The Death Certificate of Constantine Theodore who died in Chicago November 24, 1943 was introduced in evidence as respondent exhibit #1.)

(The testimony of Theodore Constantine which appears on pages 690 and 691 of the transcript of the original trial of the petitioner, was then admitted in evidence and made part of this record on pages 532-535.) (Page 535 the testimony of Officer Frank Byrnes given at the original trial of the petitioner in Case No. 40-939, and appearing on pages 206, 207 and 208 was then offered in evidence and admitted without objection on pages 536-540. The testi-

mony of Officer Frank Byrnes was to the effect that
87 he did not abuse or kick the petitioner nor did anyone in his presence strike the defendant Henry Napue.)

HENRY NAPUE, Petitioner, having been previously duly sworn, was called in rebuttal as a witness on his own behalf and was examined and testified as follows:

Direct Examination by Mr. Leighton:

Petitioner exhibits #1a and 1b marks for identification.

(Number 1a is the front side of the Cook County Jail intake record, number 1b is the reverse side containing the signature of the inmate, Cook County Jail, Henry Napue and bearing date June 17, 1940.)

Petitioner's exhibit 1b contains my signature. I remember signing it on the date that it bears.

I signed that document the first time I was turned over to Cook County Authorities after my arrest in New Jersey. They took me there the first time, but they would not take me because something was wrong. They took me back to 11th Street and that afternoon they brought me back to the Cook County Jail.

That is when I signed the document. I don't remember the name of the doctor who examined me. I heard this testimony of Officer Morgan in connection with a written statement of June 13, 1940. I don't remember signing any statements. I don't remember Officer Morgan being with me that day. I was at the office of the State's Attorney sometime, but I don't remember the date.
88 I don't remember how many days transpired between the time I arrived from New Jersey and the first time I was taken to the State's Attorney's office, but it should have been five or six days at least.

(The intake record, petitioner's exhibit 1a and 1b admitted in evidence.)

Cross Examination by Mr. Lee:

I recall testifying at my trial in 1940.

I was asked certain questions at my trial.

I can't remember being asked the question put to me by the State's Attorney.

(Witness excused.)

(The statement by counsel for petitioner that certain witnesses had been subpoena, Mrs. Goldi Clay, 5803 So. Michigan Ave, Chicago, Illinois and Mrs. Mary Moore, former wife of petitioner, 3661 West Ogden Avenue, Chicago, Illinois. These witnesses apparently lost their way to the court and were not present for testimony. Counsel for petitioner stated to the court that they would corroborate in saying that in time that the petitioner was brought from jail Mrs. Mary Moore, then Mary Napue the wife of petitioner and Mrs. Goldi Clay were not able to locate the petitioner during the time between June 11, 1940 and June 17, 1940 and that they made several efforts to obtain information from the Police as to the place the Police were holding petitioner. That they employed a Mr. Max R. Neiman an attorney at law, a member of the bar in this State to represent petitioner and that several days search throughout the Police Department they were able to see him for the first time in the office of the State's Attorney, Mr. Morris Meyers.

Counsel for the petitioner then stated that the purpose for the testimony of these absent witnesses would be to corroborate petitioner.

(The court then stated that there were no controversy about the fact that the petitioner was held in custody from the 11th day of June 1940 until he was received in the Cook County Jail on June 17, 1940 after being held over from the Felony Court to the Grand Jury.)

(Page 556). It was stipulated by and between the petitioner by his counsel, and the respondent by the State's Attorney of Cook County that the transcripts of the proceedings of the original trial, People of the State of

Illinois vs. Henry Napue, Case No. 40-939, and the report of proceedings of Post Conviction Hearings had in the Post Conviction proceedings be admitted in evidence without objection.

Discussion between court counsel for petitioner and petitioner with regard to further evidence available, and the petitioner represented to the court through his counsel that other than a possible affidavit from George Hamer, there was no further proof to be offered on behalf of petitioner in support of the allegations made concerning denial of Federal and State Constitutional Rights.

90 The Court: (Whose witness will Hamer be? I think that probably is the nub of the whole situation. I hear nobody offering to throw their arms around him.

Well, the evidence is closed then, regardless of whether there is an affidavit.

That is the end of the case as far as I am concerned. Does counsel have anything to say?

Argument of counsel for both sides. Order of the court that the petition is denied.

91 **Memorandum Denying Past Conviction Hearing**

Mr. Leighton: Nothing else, Judge.

The Court: All right. The record, I think, indicates by virtue of the testimony that the Court was permitted to hear, that the story Hamer told in regard to who was present and what occurred at the scene of this murder, was also told by all of the other participants who were either prior to 1940 or subsequent to 1940 tried and convicted of this crime. Mr. Meyers in his testimony indicated that Webb and Poe and whoever the fourth man was, all indicated that Napue was there and testified and so we have not only Hamer's word that he was there, we have the alleged—or we have the confession of Napue plus the testimony—or the evidence at least in this record, that the others also were present. Meyers, as I recall the record, was not concerned in regard to Hamer being convicted of a crime for which he was not guilty, but guilty though he was, he thought his sentence for the extent of his partici-

pation in the crime was too severe, and for that reason he told Hamer that, if after all of the participants who had been named, some of whom had not been taken in custody and corroborated Hamer's account as to his being on the fringe of this crime and not a central participant; that he then would feel that the sentence that was envoked in regard to Hamer was too severe for the part that
92 he did play and that he would if he could intercede at the only place where intercession could be made before the Parole Board or the Governor in regard to correcting in what Mr. Meyer's felt an over-heavy sentence.

I think the evidence as far as he was concerned indicated that what he told Hamer was contingent not upon Hamer's testifying for the prosecution in the Napue case, but was contingent upon further corroboration of Hamer's story by the other defendants if and when they were apprehended and it was only after other defendants were apprehended and had made statements and had corroborated what Hamer told Mr. Meyers in regard to the extent of his participation in this case, that Mr. Meyers then went in on this petition for writ of error coram nobis and did the things that this record indicates that he did. And I think that there is a serious question as to whether, if it was perjury in regard to, whether, or not he had been made a promise, and if Meyers permitting him to so testify, if that's the type of perjured testimony that the Act has in mind. I think there is a serious question there. The perjury in my opinion must be in regard to the guilt or the innocence of the defendant and the Court does not hold that there was a promise made to Hamer based upon his testifying which seems to be the position taken by this Petitioner, that Hamer would not have testified in
93 the Napue case had he not been promised some consideration by Meyers. The Court feels that any statement made by Meyers was based not upon his testimony in the Napue case but was based upon that subsequent investigation revealed after all the participants of the murder had been apprehended.

That being the case, the Court feels that this Petitioner has failed to establish what the degree of proof required by law the allegations of this petition, and after a full hearing, Mr. Clerk, be sure that the Supreme Court has that in the order, rather than take what was in the order before—the petition is denied.

Certificate of the Court Reporter.

Certificate of the Clerk of the Criminal Court of Cook County.

Respectfully submitted,

GEORGE N. LEIGHTON
Attorney for Petitioner

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112 IN THE SUPREME COURT OF ILLINOIS

Docket No. 34352—Agenda 31—March, 1958.

Henry Napue, Plaintiff in Error, v. The People of the State of Illinois, Defendant in Error.

Opinion—May 21, 1958

Mr. JUSTICE KLINGBIEL delivered the opinion of the court:

Henry Napue filed a petition in the criminal court of Cook County under the Post-Conviction Hearing Act. (Ill. Rev. Stat. 1957, chap. 38, pars. 826-832,) seeking to set aside a conviction for murder on the ground that it was obtained by the knowing use of perjured testimony. It is further alleged that oral admissions were made as a result of coercion during an illegal detention, and that the introduction of testimony concerning such admissions deprived him of due process. After a hearing on the petition the trial court denied relief. We have allowed a writ of error to review the record.

Petitioner contends his accomplice, who appeared as a witness against him, falsely testified that he had not been promised any consideration for his testimony, and that the

prosecutor knew the statement to be false. Petitioner was convicted in 1940, after trial by jury, and was sentenced to imprisonment for a term of 199 years. The crime for which he was tried occurred on August 21, 1938, when a police officer was killed during the robbery of a Chicago cocktail lounge. There were five participants in the crime. One George Hamer was wounded in the shooting. He was apprehended and convicted of murder on a plea of guilty, receiving a sentence of 199 years. At petitioner's trial in 1940, Hamer was called as the principal witness on behalf of the State. On cross-examination he was asked whether anyone had promised him a reward for testifying, to which he replied that no one had promised him anything. Upon further questioning he admitted, however, that when he was interviewed in the penitentiary he said he would not testify unless he received some consideration for it, and that while he was waiting in the cell to be called at the trial some lawyer came to him and promised to do what he could. On re-direct examination the assistant State's Attorney asked: "Have I promised you that I would recommend any reduction of sentence to anybody?" Hamer replied: "You did not."

Several years after the petitioner's conviction the lawyer who had prosecuted the case, and who had since resigned from his position as assistant State's
113 Attorney, filed a petition in the nature of a writ of error *coram nobis* on behalf of Hamer. Among other matters he alleged therein that at the time Hamer was sentenced he promised him that if he would cooperate with law-enforcing officials upon the trial of Napue when he was apprehended, a recommendation for a reduction of his sentence would be made and, if possible, effectuated. The former prosecuting attorney testified on behalf of the State at the present hearing. He explained that in 1938 Hamer had insisted he was not a voluntary participant in the crime. He then told Hamer that if this were borne out when the other participants were apprehended, he would bring the matter to the attention of the proper authorities. Prior to testifying at

Napue's trial, Hamer asked the assistant State's Attorney whether the latter would do what he had said, to which the assistant State's Attorney replied that he would keep his word and would direct the attention of the proper authorities to Hamer's case if he were satisfied that Hamer was telling the truth. Hamer was not called as a witness at the present post-conviction hearing.

Where a conviction is obtained by the presentation of testimony known by the prosecuting authorities to be perjured, the constitutional requirement of due process is not satisfied. (*Pyle* v. *Kansas*, 317 U.S. 213, 87 L. ed. 214; *Mooney* v. *Holohan*, 294 U.S. 103, 79 L. ed. 791.) To show a denial of due process within the meaning of this rule it is not necessary that the false testimony be concerned directly with the question of guilt. Even though it bears only upon the credibility of a witness, it may have the effect of depriving the accused of a fair trial. Whether such effect is present depends, of course, upon the circumstances of the particular case. In *People* v. *Savvides*, 1 N.Y.2d 554, 136 N.E.2d 853, the defendant was convicted in substantial part upon testimony given by an accomplice. Prior to the trial the assistant district attorney had reached an understanding with the accomplice, who had pleaded guilty, that upon the latter's "continued co-operation" the district attorney would permit him to withdraw his plea and to plead guilty to a lesser offense. Upon the defendant's trial the accomplice denied that he expected any consideration in return for his testimony; and the assistant District Attorney remained silent. It was held that the prosecutor's failure to expose the falsehood substantially prevented the defendant from having a fair trial, despite the fact that it did not bear directly upon evidence
114 of guilt. The court pointed out the danger that if an accomplice is promised leniency or other consideration in return for his testimony, he is likely to incriminate others to further his own interests, and that the jury's ability to weigh his testimony would be seriously impaired unless disclosure is made.

In the case at bar the evidence at the post-conviction hearing leaves little doubt that the prosecutor had promised Hamer if he would give testimony against Napue his cooperative actions would be brought to the attention of the appropriate authorities, to effectuate, if possible, a reduction in his sentence. This would be his reasonable understanding of the statements made by the prosecutor, and the State does not here deny that such a promise was made. Hamer's testimony to the effect that no promise had been given to him was clearly untrue, and had there been no disclosure of its falsity the petitioner's contention would raise a serious constitutional question. Subsequent testimony by Hamer revealed, however, that he had been reluctant to testify unless he received consideration for it, and that prior to the trial he was assured that efforts would be made on his behalf. Such disclosure was sufficient to apprise the jurors that he had some interest or motive in testifying, and enabled them to judge his other testimony in the light thereof. We think, therefore, that under the circumstances of this case the trial court was warranted in concluding there was no constitutional infirmity by virtue of the false statement.

As a further contention petitioner merely asserts that after his arrest he was held in custody from June 11, 1940, until June 17, 1940, without being taken before an examining magistrate; that he was continually questioned to induce a confession; and that "the record contains positive proof of illegal incarceration rendering any confession oral or written inadmissible." There is no further argument on the point. We have considered the contention, however, and find it to be without merit. It does not appear that any confession made by Napue was in fact offered in evidence at his trial. Moreover, an illegal detention, while it may serve to corroborate other evidence of coercion, does not of itself render a confession or an admission involuntary. (*Davies* v. *People*, 10 Ill. 2d 14; see, also, *People* v. *LaFrana*, 4 Ill. 2d 261, 266.) The trial court was in a position to determine the credibility of the witnesses before it and to weigh their testimony. Nothing has been shown by

petitioner to justify this court in setting aside its findings. The order of the criminal court is affirmed.

Order affirmed.

MR. JUSTICE SCHAEFER, dissenting:

The opinion of the court holds that Hamer's testimony was false and that the prosecution knew that it was false. And the opinion also holds, in accord with *People* v. *Savvides*, (N.Y.) 136 N. E.2d 853, that due process can be violated by knowingly false testimony that goes to the credibility of a key witness as well as by that which goes directly to guilt or innocence. With these holdings I agree.

But the opinion goes further and says: "Subsequent testimony by Hamer revealed, however, that he had been reluctant to testify unless he received consideration for it, and that prior to the trial he was assured that efforts would be made in his behalf. Such disclosure was sufficient to apprise the jurors that he had some interest or motive in testifying, and enabled them to judge his other testimony in the light thereof." What is overlooked here is that Hamer clearly testified that no one had offered to help him except an unidentified lawyer from the public defender's office. The jury could have concluded, and probably did conclude, that such an offer of help was unlikely to influence Hamer. The fact was, however, that the offer was not made by an unidentified assistant public defender, but by the assistant State's Attorney in charge of prosecuting the case.

The relevant parts of Hamer's cross-examination are these:

"Q. Did anybody give you a reward or promise you a reward for testifying?

A. There ain't nobody promised me anything.

Q. Directing your attention to that time and place in Statesville, did you tell Mr. Steinberg [one of Napue's attorneys] that you were drunk that day?

A. No. I didn't.

Q. And didn't you tell him that you wouldn't testify in this case unless you got some consideration for it?

A. I would have told him anything to get him away. I didn't want to talk to him.

Q. Did you tell him what I told you?

A. Yes.

Q. You said you wouldn't testify unless you got some consideration?

A. Yes; I did; I told him that.

* * *

Q. What are you sentenced for?

A. One hundred ninety-nine years.

Q. You hope to have that reduced, don't you?

A. Well, if anybody would help me or do anything for me, why certainly I would.

Q. Weren't you expecting that when you came here today?

A. There haven't no one told me anything, no more than the lawyer. The lawyer come in and talked to me a while ago and said he was going to do what he could.

Q. Which lawyer was that?

A. I don't know; it was a Public Defender. I don't see him in here.

Q. You mean he was from the Public Defender's office?

A. I imagine that is where he was from, I don't know.

Q. And he was the one who told you that?

A. Yes, he told me he was trying to get something did for me.

* * *

Q. Now, George, while you were at Statesville here, serving your term, about two months ago were you visited by some police officers?

A. Yes, some police officers came to see me.

Q. They came and asked you about this trial, didn't they, of Henry Napue?

A. Yes, they said something about it.

Q. They came to ask you if you would be willing to testify, didn't they?

A. Yes.

Q. And, of course, at that time you told them you would?

A. Yes.

Q. And you told them you would but you expected some consideration for it?

A. I asked them was there any chance of me getting any. The man told me he didn't know, that he couldn't promise me anything.

Q. Then you spoke to a lawyer today who said he would try to get your time cut?

A. That was this Public Defender. I don't even know his name. I could point him out, if I saw him.

Q. How do you know he is from the Public Defender's office?

A. I seen him once before when I was being tried.

117 Q. But you don't know he is from the Public Defender's office?

A. No, I don't know where he is from."

The opening questions and answers on Hamer's redirect examination were these:

"Q. Mr. Hamer, has Judge Prystalski [the trial judge] promised you any reduction of sentence?

A. No, sir.

Q. Have I promised that I would recommend any reduction of sentence to anybody?

A. You did not.

Q. Has any representitive of the Parole Board been to see you and promised you a reduction of sentence?

A. No, Sir.

Q. Has any representative of the Governor of the State of Illinois promised you a reduction of sentence?

A. No, sir."

The effort to exclude all suggestion of any official promise is unmistakable. Thereafter, the prosecutor who had asked these questions and elicited these answers filed a *coram nobis* petition on behalf of Hamer which alleged:

"Your petitioner, Morris G. Meyers, well knowing that identifications of Poe, Napue and Webb if and when appre-

hended would be of an unsatisfactory character and not the kind of evidence upon which a jury could be asked to inflict a proper, severe penalty, and being unable to determine in advance whether Poe, Napue and Webb would make confessions of their participation in the crime represented to Hamer that if he would be willing to cooperate with law enforcing officials upon the trial or trials of Poe, Napue and Webb when they were apprehended, that a recommendation for a reduction of his sentence would be made and, if possible, effectuated. Hamer at that time unhesitatingly expressed a complete willingness to cooperate at any time he would be called upon. * * *

"Before testifying on behalf of the State and against Napue, Hamer expressed to your petitioner a reluctance to cooperate any further unless he were given definite assurance that a recommendation for reduction of his sentence would be made. Your petitioner, Morris G. Meyers, feeling that the interest of justice required Hamer's testimony, again assured Hamer that every possible effort would be made to conform to the promise previously made to him. Hamer took the witness stand and without equivocation proceeded to supply, in detail under oath, all the testi-
118 mony which corroborated completely the confession made by Napue. Without Hamer's testimony a conviction of Napue upon his own uncorroborated confession may have been extremely doubtful."

The record shows that the prosecution deliberately used perjured testimony to bring about the judgment of conviction. I think that our own constitution and the Federal constitution require that a conviction so procured be set aside.

MR. CHIEF JUSTICE DAVIS joins in this dissenting opinion.

119 IN THE SUPREME COURT OF ILLINOIS

No. 34352

PEOPLE STATE OF ILLINOIS, *Defendant in Error*

vs.

HENRY NAPUE, *Plaintiff in Error*

Appeal from

Error to Criminal Court Cook County P. C. 21

Judgment—May 21, 1958

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the order aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

THEREFORE, it is considered by the Court that the order of the Criminal Court of Cook County aforesaid, BE AFFIRMED IN ALL THINGS AND STAND IN FULL FORCE AND EFFECT, notwithstanding the said matter and things therein assigned for error.

120 Clerk's Certificate to foregoing transcript omitted in printing

OCTOBER TERM, 1958

No. 213 Misc.

HENRY NAPUE, *Petitioner*

vs.

PEOPLE OF THE STATE OF ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Illinois.

Order Granting Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari—December 15, 1958

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 583 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

December 15, 1958

Mr. Justice Frankfurter took no part in the consideration or decision of this motion and application.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 583

HENRY NAPUE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR PETITIONER

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ARGUMENT:

I. Petitioner's claim that his conviction was procured by the known use of perjured testimony is supported by the record and by the Supreme Court of Illinois in its opinion; therefore, under the doctrine pronounced by this court in *Mooney* v. *Holohan*, Petitioner has shown that he was denied due process of law in the Illinois Criminal Court 10

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 583

HENRY NAPUE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR PETITIONER

Petitioner, HENRY NAPUE, is under a sentence of 199 years in the Illinois State Penitentiary imposed by an Illinois criminal court. After petitioner's conviction, he brought a proceeding under the Illinois Post-Conviction Hearing Act claiming violation of rights under the Fourteenth Amendment to the Constitution of the United States. He claimed that his conviction was obtained through state procured perjury. Relief was denied petitioner in the Illinois trial court; and the Supreme Court of Illinois, with two justices dissenting, affirmed the trial court ruling. This court granted certiorari. Petitioner respectfully prays that the judgment of the Supreme Court of Illinois affirming denial of post-conviction relief be reversed.

Opinion Below

The opinion of the Supreme Court of Illinois is reported in 13 Ill. 2d 566, 150 N.E. 2d 613, and is reprinted at R. 76.

Jurisdiction

The final judgment of the Supreme Court of Illinois was entered on May 21, 1958 (R. 77). Petition for writ of certiorari to the Supreme Court of Illinois was filed August 19, 1958, and was granted on December 15, 1958, (R. 78).

The jurisdiction of this court rests upon 28 U.S.C., Sec. 1257 (3).

Questions Presented

I

Whether on the record at bar, petitioner was denied due process of law in an Illinois criminal court where petitioner was convicted after trial in which perjury of the principal witness was knowingly used by the State of Illinois to obtain the conviction of petitioner.

II

Is there valid justification in this record for the conclusion of the Supreme Court of Illinois that the infirmity of perjury, knowingly used by the prosecution to obtain petitioner's conviction in violation of the due process clause of the Fourteenth Amendment, was removed by other testimony of the perjurer?

Statutes Involved

Chap. 38, Sec. 358, Ill. Rev. Stat. (1953).

Homicide

Act of March 27, 1874, resumed.

(Murder) 140. Murder is the unlawful killing of a human being, in the peace of the people, with malice aforethought, either expressed or implied. The unlawful killing may be perpetrated by poisoning, striking, starving, drowning, stabbing, shooting, or by any other of the various forms or means by which human nature may be overcome, and death thereby occasioned. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

Chap. 38, Sec. 360, Ill. Rev. Stat. (1953).

(Murder—Punishment) 142. Whoever is guilty of murder, shall suffer the punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years. If the accused is found guilty by jury, they shall fix the punishment by their verdict; upon a plea of guilty, the punishment shall be fixed by the court.

Chap. 38, Sec. 826-832 (1951), Post-Conviction Hearing Act.

"§ 826. Proceeding to determine whether constitutional rights were denied—Petition—Limitations

Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction

there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Act. The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit. Petitioner shall also serve another copy upon the state's attorney by any of the methods provided in Rule 7 of the supreme court. The clerk shall docket the petition upon his receipt thereof and bring the same promptly to the attention of the court. No proceeding under this Act shall be commenced more than five years after rendition of final judgment, or more than three years after the effective date of this act, whichever is later, unless the petitioner alleges facts showing that the delay was not due to his culpable negligence. 1949, Aug. 4, Laws 1949, p. 722, § 1."

Statement

(a) *The facts.*

In June, 1940 petitioner was indicted by the grand jury of Cook County, Illinois for a murder alleged to have been committed in 1938 (R. 16, 20). He persisted in his innocence (R. 28), entered a plea of not guilty and was brought to trial before a jury in August of that year (R. 8). By that time, however, eye-witnesses to the alleged crime (R. 18) had moved from Illinois to the State of California (R. 20). The prosecution, therefore, relied upon the testimony of a man named George Hamer (R. 8-15) who had pled guilty to and had been sentenced for the crime with which petitioner was charged (R. 19, 20, 21).

Hamer was returned to Cook County on a writ of habeas corpus, and his testimony was extremely important to the prosecution (R. 20). In fact, without Hamer's cooperation

it was extremely doubtful that petitioner could have been convicted (R. 21).

After Hamer's testimony on behalf of the state, he was cross-examined by counsel for petitioner (R. 11-15). During this cross-examination the prosecuting attorney with whom Hamer had talked (R. 20-21) was present (R. 8). Hamer was asked these questions (R. 2-5):

Q. GEORGE HAMER, you were called a little while ago to come in here and testify?

A. Yes.

Q. And you refused to come in, didn't you?

A. I did not.

Q. It took quite a while for you to get here, didn't it?

A. They had to bring me from downstate.

Q. I mean while you were in the lock-up here. Didn't they ask you about 15 minutes before you got here, to testify?

A. No.

Q. Did anybody give you a reward or promise you a reward for testifying?

A. They ain't nobody promised me anything.

Q. Are you testifying of your own free will?

A. Yes.

* * * * * * *

Q. Now then, you Hamer are in jail under what term?

A. Stick-up and murder.

Q. What are you sentenced for?

A. One Hundred and Ninety Nine years.

Q. You hope to have that reduced don't you?

A. Well, if anybody would help me or do anything for me, why certainly I would.

Q. Weren't you expecting that when you came here today?

A. There haven't no one told anything, no more than

the lawyer. The lawyer come in and talked to me a while ago and said he was going to do what he could.

Q. Which lawyer was that?

A. I don't know; it was a Public Defender. I don't see him in here.

Q. You mean, he was from the Public Defender's Office?

A. I imagine that is where he was from, I don't know.

Q. And he was the one who told you that?

A. Yes, he told me he was trying to get something did for me.

Q. That was when you were informed that you were going to come and testify here?

A. I was informed that I was going to testify here when I left Stateville this morning.

Q. And when did this Public Defender lawyer come to see you?

A. He come back and talked to me a little while back.

Q. How long ago do you mean?

A. I don't know. There is not even a clock back there.

Q. Do you know the lawyer's name?

A. No, I don't.

* * * * * * *

Q. Then you spoke to a lawyer today who said he would try to get your time cut?

A. That was this Public Defender. I don't even know his name. I could point him out, if I saw him.

Q. How do you know he is from the Public Defender's Office?

A. I seen him once before when I was being tried.

* * * * * * *

Re-Direct Examination.

By Mr. Meyers (R. 5):

Q. Mr. Hamer, has Judge Prystalski promised you any reduction of sentence?

A. No, sir.

Q. Have I promised you that I would recommend a reduction of sentence to anybody?

A. You did not.

* * * * * * * * *

After the re-direct examination, Hamer was excused without any further questioning (R. 15). On Hamer's testimony, the jury returned a verdict of guilty and sentenced petitioner to serve a term of 199 years in the Illinois State Penitentiary.

In 1946 (R. 24), the prosecuting attorney in petitioner's case resigned his position; and, on behalf of Hamer, filed a *coram nobis* petition in the Criminal Court of Cook County (R. 16-24) in which he alleged, under oath, that while he was the prosecuting attorney he caused Hamer to be brought from the Illinois State Penitentiary on a writ of habeas corpus *ad testificandum* as the principal and most important witness against petitioner (R. 20). He alleged that when Hamer arrived for petitioner's trial, he expressed a reluctance to cooperate with state authorities unless he, Hamer, were given definite assurances that a recommendation for reduction of his sentence would be made (R. 20). The former prosecuting attorney alleged that he was convinced that Hamer's testimony had to be obtained; therefore, he assured Hamer that a recommendation for reduction of his sentence would be made to proper authorities (R. 19-21). Having received these promises, Hamer agreed to testify against petitioner and furnish evidence necessary to obtain petitioner's conviction (R. 23).

The filing of the *coram nobis* petition by the former prosecuting attorney six years after petitioner's conviction was the subject of newspaper comments (R. 38) which were called to petitioner's attention (R. 38). Using the facts alleged in the *coram nobis* petition, petitioner filed a post conviction proceeding in the Criminal Court of Cook County.

(b) *Questions presented below.*

In his post conviction application petitioner claimed that because false testimony was used to obtain his conviction he was denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States (R. 6, 7, 28, 29). After a hearing (R. 35-76), the trial court denied post conviction relief (R. 67-69). The Supreme Court of Illinois granted a review of the trial court proceedings (R. 69). With the Chief Justice and one Justice dissenting, the court affirmed the trial court judgment and rejected petitioner's federal constitutional claim that his conviction was obtained by knowing use of perjured testimony (R. 69-76). This court granted certiorari to review the judgment of the Supreme Court of Illinois (R. 78).

Summary of the Argument

I

The record, and indeed, the judgment of the Supreme Court of Illinois, sustains petitioner's claim that his conviction by an Illinois criminal court was procured through the known use of perjured testimony. It is clear that the testimony of the principal prosecution witness was perjury calculated to mislead the jury. The prosecuting attorney who was present throughout the testimony of the prosecution's principal witness knew that the testimony was false;

yet he remained silent, and knowingly used the perjured testimony to obtain petitioner's conviction.

Petitioner's conviction thus obtained deprived him of due process of law and is contrary to the general principles laid down by this court in *Mooney* v. *Holohan*, *Pyle* v. *The State of Kansas*, and *Alcorta* v. *Texas*.

II

The Supreme Court of Illinois, in its opinion from which two justices dissented, attempts to justify its departure from *Mooney* v. *Holohan* and *Pyle* v. *State of Kansas* by holding that the unconstitutional effect of the known use of perjury in petitioner's case was ameliorated by its revelation. However, the record does not sustain the Supreme Court of Illinois.

Furthermore, the due process clause of the Fourteenth Amendment to the Constitution of the United States is not satisfied by revealed perjury knowingly used to obtain a conviction. Perjury, if knowingly used in a state court to obtain a conviction deprives a defendant of due process of law whether disclosed or not. In any event, the record at bar shows that no ameliorating subsequent testimony was given by the perjured witness after he had falsely testified against petitioner in the presence of the prosecuting attorney.

ARGUMENT

I.

Petitioner's Claim That His Conviction Was Procured by the Known Use of Perjured Testimony Is Supported by the Record and by the Supreme Court of Illinois in Its Opinion; Therefore, Under the Doctrine Pronounced by This Court in Mooney v. Holohan, Petitioner Has Shown That He Was Denied Due Process of Law in the Illinois Criminal Court.

Petitioner's original application for post-conviction relief was filed by him as a poor person (R. 1-8). In it he alleged that in the state criminal trial " . . . One George Hamer was called as a witness on behalf of the People, and having first been duly sworn, testified against your petitioner after he was brought to the courtroom from the Illinois State Penitentiary . . . " (R. 2). Petitioner then incorporated portions of court records showing that before Hamer testified, the prosecuting attorney spoke with Hamer and assured him that a recommendation for the reduction of his sentence would be made in return for his testimony against petitioner (R. 6-7).

This same prosecutor was present throughout the trial of petitioner, including the time when Hamer testified (R. 8, 15, 16-24).

After Hamer's direct testimony, he was cross-examined (R. 2-6). Hamer then testified that he was testifying without promise of any reward or reduction of the sentence he was then serving (R. 3). In answer to questions put to him by counsel for petitioner, he testified that other than " . . . a Public Defender . . . " no one had made any representations to him concerning possible reduction of his sentence in return for his testimony (R. 4). On re-direct examination (R. 5), the prosecuting attorney who, before

Hamer testified, and in return for his testimony, had promised Hamer he would recommend a reduction in his sentence (R. 20-21), asked Hamer (R. 5), " . . . Have I promised you that I would recommend any reduction of sentence to anybody? A. You did not . . . "

To furnish an understanding of the background of Hamer's testimony, we point out that in Illinois a public defender system is maintained for the defense of the indigent. Hamer's testimony before the jury that the lawyer who had talked with him was " . . . a Public Defender . . : " carried a special evidentiary impact because in the Criminal Court of Cook County the Public Defender is well known, and his duties and functions are of common knowledge. The perjurous aspect of this phase of Hamer's testimony is borne out by the prosecuting attorney himself, who in his affidavit described in detail the contacts and the familiarity that existed between him and Hamer, a familiarity that had developed during the prosecution of Hamer for the crime with which petitioner was charged (R. 16-24).

Therefore, Hamer's testimony, before a jury, was unmistakably an " . . . effort to exclude all suggestions of any official promise . . . " (R. 75). It is readily apparent that this studied attempt by Hamer to mislead the jury was an attempt to elude the fact that in return for his testimony he had been promised consideration concerning the reduction of his sentence, not by " . . . a Public Defender . . . " who ordinarily would be acting on behalf of a defendant, but by the prosecutor who was then standing before him, the court and the jury; and who remained silent while Hamer was giving on behalf of the state, testimony which the prosecutor knew was not true. This conclusion is clearly evident from the affidavit of Mr. Meyer, the prosecuting attorney (R. 16-24).

It is plain that the false testimony used in this fashion by the state deprived petitioner of a fair trial. If Hamer

had truthfully revealed that the lawyer who had spoken with him was the prosecutor who was then standing before the jury, further inquiries could have been made by petitioner's counsel concerning his interest in giving testimony against petitioner and concerning promises which had been made to him by Mr. Meyer, the prosecuting attorney.

To have assured petitioner a fair trial the truth from this principal witness was important because he was the only person who could give evidence to secure petitioner's conviction. This fact is admitted in the prosecuting attorney's affidavit which he submitted as part of the petition for writ of *coram nobis* filed on behalf of Hamer, the witness (R. 18, 19, 20, 21). The Supreme Court of Illinois in its opinion found that " . . . in 1940 Hamer was called as the principal witness on behalf of the state . . . " (R. 70). The prosecuting attorney said that the importance of Hamer's testimony was vital because a witness to the alleged crime, Mrs. Neeley " . . . had moved to California and if brought back, and identification at that late date with so much time intervening from the time of the commission of the offense, would at best be highly questionable . . . " (R. 20). He went further and said that, " . . . It developed that Hamer's testimony was extremely important because the trial judge presiding at the trial of Napue ruled against the State's contention that evidence of previous robberies were admissible . . . " (R. 20). Finally, the prosecutor said that " . . . Without Hamer's testimony a conviction of Napue upon his own uncorroborated confession may have been extremely doubtful . . . " (R. 21).

Despite the inability of counsel for petitioner to elicit the truth from Hamer, the instinct of the cross-examiner caused him to ask this question (R. 5):

> Q. Then you spoke to a lawyer today, who said he would try to get your time cut?

A. That was this Public Defender. I don't even know his name. I could point him out, if I saw him.

Now according to the prosecutor, " . . . Before testifying on behalf of the State and against Napue, Hamer expressed to your petitioner a reluctance to cooperate any further unless he was given definite assurance that a recommendation for the reduction of his sentence would be made . . . " (R. 20). This conversation took place a few moments before Hamer was called as a witness against petitioner (R. 51). The prosecutor, Mr. Meyer, had questioned Hamer at the time of his arrest in August, 1938, immediately after the alleged crime (R. 17-18). On several occasions there had been discussions and conversations between them concerning Hamer's participation in the crime with which petitioner was charged (R. 18-21). It is evident, therefore, that when Hamer said, " . . . That was this Public Defender. I don't even know his name. I could point him out if I saw him . . . " (R. 5), he was lying deliberately. And the prosecuting attorney knew it.

On re-direct examination the prosecuting attorney went over the same ground; and for emphasis, asked this question (R. 5):

Q. Have I promised you that I would recommend any reduction of sentence to anybody?

A. You did not.

This denial by Hamer elicited by the prosecuting attorney, is in direct conflict with the allegations in the prosecutor's affidavit which was made a part of petition for a writ of error *coram nobis* filed on behalf of Hamer some six years later (R. 16-24). In fact, the words of the former prosecutor are so strong that they deserve quotation here. He asked the court to grant relief to Hamer by construing the Illinois Habeas Corpus Act so as to give " . . . effectual consummation of the compact entered into between the

duly authorized representatives of the State of Illinois and George Hamer . . . " (R. 23), when Hamer agreed to give evidence against petitioner. Certainly, if there existed a compact between the " . . . duly authorized representatives of the State of Illinois and George Hamer . . . . " the judge and the jury that convicted petitioner on the evidence of the principal witness for the prosecution was entitled to this important information through truthful answers to questions put by petitioner's attorney on cross-examination (R. 2-5).

In its opinion, the Supreme Court of Illinois said, " . . . in the case at bar the evidence at the post-conviction hearing leaves little doubt that the prosecutor had promised Hamer if he would give testimony against Napue his cooperative actions would be brought to the attention of the appropriate authorities, to effectuate, if possible, a reduction of his sentence. This would be his reasonable understanding of the statements made by the prosecutor, and the state does not here deny that such a promise was made. Hamer's testimony to the effect that no promise had been given to him was clearly untrue . . . " The Chief Justice of the Supreme Court of Illinois joined in a dissenting opinion in which Mr. Justice Shaeffer said: "The opinion of the court holds that Hamer's testimony was false and that the prosecution knew that it was false . . . " (R. 73).

This being the case, the constitutional doctrine first pronounced by this court in *Mooney* v. *Holohan*, 294 U.S. 103, and applied in *Pyle* v. *State of Kansas*, 317 U.S. 213, and more recently extended in *Alcorta* v. *Texas*, 355 U.S. 28, controls this case.

The language of a unanimous court in *Mooney* bears repetition here, 294 U.S. 103 at 112:

> " . . . [due process of law] in safeguarding the liberty of the citizen against deprivation through the action of

the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. *Hebert* v. *Louisiana*, 272 U.S. 312, 316, 317, 47 S.Ct. 103, 71 L.Ed. 270, 48 A.L.R. 1102. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to produce the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation . . ."

This general principle of constitutional law has never been weakened by this court in any subsequent case. Recently, in *Alcorta* v. *Texas*, 355 U.S. 28 this court, *per curiam*, extended the doctrines pronounced in *Mooney* and *Pyle* and reversed denial of a writ of habeas corpus to a petitioner who had alleged that he had been indicted for murder in a Texas court. Petitioner had relied upon a Texas statute which treated killing under the influence of sudden passion as murder without malice, and punishable by a maximum term of five years in prison. The theory of petitioner's defense in the state court was that he had suspected his wife of marital infidelity and that he had found his wife kissing the principal state witness while the witness and his wife were together in a parked car.

In response to inquiries by the prosecutor concerning his relationship with petitioner's wife, the state witness said that he had simply driven her home, and in substance testified that his relationship with petitioner's wife was nothing more than that of a casual friend. The witness' testimony was plainly inconsistent with the petitioner's

claim that he had found the witness and his wife kissing in a parked car.

Petitioner was convicted of murder with malice and sentenced to death.

After petitioner's conviction had been affirmed, the principal state witness issued a sworn statement in which he declared he had given false testimony at the trial. Petitioner then applied for a writ of habeas corpus in the trial court claiming that he had been denied a fair trial in violation of state and federal constitutions, because the principal state witness testified falsely with the knowledge of the prosecutor. In truth, petitioner claimed, the witness had been the lover of petitioner's wife and had sexual intercourse with her on many occasions.

A hearing was granted the petitioner. The principal witness for the prosecution then confessed that, contrary to his testimony in the trial, he had had sexual intercourse with petitioner's wife on five or six occasions. He testified that he had informed the prosecutor of this fact before trial, and the prosecutor told him that he should not volunteer any information about such intercourse; but if specifically asked about it, to answer truthfully. The prosecutor admitted these statements were true. Petitioner's application for habeas corpus was denied.

In reversing and remanding the cause this court said: "... It cannot be seriously disputed that Castilleja's testimony taken as a whole, gave the jury the false impression that his relationship with petitioner's wife was nothing more than that of casual friendship. This testimony was elicited by the prosecutor who knew of the illicit intercourse between Castilleja and petitioner's wife. Undoubtedly Castilleja's testimony was seriously prejudicial to petitioner. It tended squarely to refute his claim that he had adequate

cause for a surge of 'sudden passion' in which he killed his wife. If Castilleja's relationship with petitioner's wife had been truthfully portrayed to the jury, it would have, apart from impeaching his credibility, tended to corroborate petitioner's contention that he had found his wife embracing Castilleja . . . "

A careful study of the *Alcorta* case reveals that perjury always accompanies—in one degree or another—suppression of evidence. Every perjuror suppresses evidence favorable to the side against which he testifies in order that he may express a falsehood. In *Alcorta*, for example, the principal state witness, with the knowledge of the prosecutor, suppressed information that he, the state witness had had intercourse with petitioner's wife. Positively he testified falsely; negatively he withheld the truth. This court wisely appreciated the impact of this falsity upon the jury, particularly when evaluated in connection with the background of the case itself. And this court extended and applied the *Mooney* and *Pyle* doctrines.

The Court of Appeals for the State of New York in *People* v. *Savvides*, 1 N.Y.2d 554, 136 N.E.2d 853, recently had before it the claim of a defendant who said that he had been prosecuted in a New York court, found guilty and sentenced, principally on the testimony of an alleged accomplice who had agreed to cooperate with the prosecutor. The agreement between the prosecutor and the witness was to the effect that, in return for his cooperation, he would be allowed to plead to a lesser offense. The witness performed his part of the bargain and testified; but on cross-examination before a jury, he denied that the prosecutor had made any promise of leniency.

The prosecutor who had entered into the agreement was present in court and remained silent when the witness denied that he had been promised consideration in return

for his testimony. In reversing the denial of a motion to set aside the verdict the Court of Appeals for the State of New York said:

1 N.Y.2d 554, 136 N.E.2d 853, at 854,

> "... It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon the defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth ... "

In view of the express holding of the Supreme Court of Illinois that in the case at bar the testimony of the principal state witness was false, with the knowledge of the prosecution, it is clear that perjured testimony was knowingly used by the prosecution to obtain petitioner's conviction. Therefore, the judgment of the Supreme Court of Illinois, should be reversed and remanded under the general principles laid down by this court in *Mooney* v. *Holohan*, 294 U.S. 103, *Pyle* v. *State of Kansas*, 317 U.S. 213, and extended in *Alcorta* v. *State of Texas*, 355 U.S. 28.

However, the Supreme Court of Illinois seeks to secure its affirmance of the trial court denial of post-conviction relief on the theory that disclosed perjury does not violate rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. We now point out the errors in the lower court judgment.

II.

The Record Does Not Support the Conclusion of the Supreme Court of Illinois That the Perjury Which Was Used in Petitioner's Trial Was Disclosed so as to Preclude a Serious Constitutional Question Arising From Petitioner's Conviction.

The Supreme Court of Illinois in affirming denial of post-conviction relief said: " . . . Hamer's testimony to the effect that no promise had been given to him was clearly untrue, and had there been no disclosure of its falsity the petitioner's contention would raise a serious constitutional question. Subsequent testimony by Hamer revealed, however, that he had been reluctant to testify unless he received consideration for it, and that prior to the trial he was assured that efforts would be made on his behalf. Such disclosure was sufficient to apprise the jurors that he had some interest or motive in testifying, and enabled them to judge his other testimony in the light thereof . . . " (R. 72).

The Supreme Court of Illinois rests its judgment on this ground. However, it is sufficient to point to the dissenting opinion of the Chief Justice and of Mr. Justice Schaefer in which they say that the falsity of Hamer's testimony concerning a conversation with an unidentified "Public Defender" was never disclosed to the jury. Further, it was never revealed to the jury that Hamer, in fact, had not talked with an unidentified "Public Defender"; but in fact, his discussions had been with the prosecutor who was then before the court, who was standing before the jury as Hamer testified, and who remained silent and allowed the false testimony to be given without his revealing what he knew to be true. The dissenting opinion goes on to say, " . . . The effort to exclude all suggestion of any official promise is unmistakable. Thereafter, the prosecutor who had asked these questions and elicited these answers filed

a *coram nobis* petition on behalf of Hamer . . . " (R. 73, 75). The Chief Justice of the Supreme Court of Illinois and Mr. Justice Schaefer concluded that the record showed the prosecution deliberately used perjured testimony to bring about the judgment of conviction. Mr. Justice Schaefer concluded, " . . . I think that our own constitution and the Federal constitution require that a conviction so procured be set aside . . . " (R. 76).

It is true that in his testimony Hamer revealed his desire to be given some consideration on his sentence (R. 4-5). But it is also true that Hamer ended his testimony with a re-direct examination by the prosecuting attorney who asked him: (R. 5).

> Q. Have I promised you that I would recommend any reduction of sentence to anybody?
>
> A. You did not.

Thereafter, a few more questions were asked of Hamer; and it appears that he was excused and never was recalled for further testimony (R. 28).

It is obvious that the record does not support the conclusion of the Supreme Court of Illinois that Hamer's perjury was disclosed so as to apprise the jurors of his interest or motive in testifying. In fact, the falsity of Hamer's testimony was never revealed to the jury. Furthermore, this court has never said that disclosure of known perjury deprives it of unconstitutional impact. Nor does our constitutional law recognize the idea that a state court conviction obtained through the known use of perjured testimony is any less reprehensible merely because the perjury is disclosed to the jury. Therefore, we submit that the general principles laid down by this court in *Mooney* v. *Holohan*, *Pyle* v. *State of Kansas* and *Alcorta* v. *Texas*, control the case at bar; and that the judgment of the Supreme Court

of Illinois should be reversed and remanded with direction to the courts below to proceed in accordance with these established constitutional doctrines.

Conclusion

For these reasons, it is respectfully submitted that the judgment of the Supreme Court of Illinois be reversed and remanded with directions.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1958.

No. 583

HENRY NAPUE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT.

The Question Presented.

The question presented is:

PETITIONER WAS CONVICTED OF MURDER UPON, *INTER ALIA*, THE TESTIMONY OF AN ACCOMPLICE WHO FIRST DENIED, THEN ADMITTED, THAT HE HAD BEEN PROMISED A RECOMMENDATION OF LENIENCY FOR HIS TESTIMONY. HOWEVER, THE WITNESS FALSELY TESTIFIED THAT THE PROMISE WAS MADE BY AN ASSISTANT PUBLIC DEFENDER, IT HAVING IN FACT BEEN MADE BY THE ASSISTANT STATE'S ATTORNEY PROSECUTING THE

CASE. THE TRIAL COURT AND THE SUPREME COURT OF ILLINOIS HAVE DETERMINED THAT PETITIONER'S CONVICTION COULD NOT IN ANY LIKELIHOOD HAVE BEEN THE RESULT OF THE WITNESS' FALSEHOOD AS TO THE IDENTITY OF THE AUTHOR OF THE PROMISE. DOES PETITIONER'S CONVICTION AND IMPRISONMENT DEPRIVE HIM OF LIBERTY WITHOUT DUE PROCESS OF LAW?

STATEMENT OF THE CASE.

Petitioner's Statement of the Case is accurate but in our opinion is so far incomplete that the Court's convenience will best be served by a restatement of the case even though that restatement involves some repetition of matters set forth in petitioner's Statement of the Case and in the opinion of the Supreme Court of Illinois.

In June, 1940, petitioner was indicted in the criminal court of Cook county, Illinois, for a murder alleged to have been committed in 1938 (Rec. 16).

It appears that at about 3:00 o'clock in the morning of August 21, 1938, four Negroes entered a cocktail lounge in Chicago. All of the men were armed. One George Hamer, a confessed participant in the affray and slaying, identified petitioner, one Howard Poe and one Trussie Townsend, as the three other participants (Rec. 16-17).

According to Hamer, one of the men, not Hamer, announced that it was a stickup and immediately there began a wild melee of shooting. Patrick O'Malley, a Chicago police officer who was off duty at the time and in civilian attire, drew his service revolver and shot as often as the bullets in his gun would permit. According to Hamer, petitioner, Poe and Townsend returned Officer O'Malley's fire, Hamer was caught in the cross fire, Townsend was shot and killed and Officer O'Malley was mortally wounded, dying from the effects of his wounds nine days later.

In the meantime, according to Hamer, Napue and Poe helped Hamer out of the rear of the cocktail lounge, where one Lucius Webb was waiting at the wheel of an automobile. Hamer was taken to the office of a Dr. Fred B. Steinberg, who rendered first aid and called the police. According to Hamer, petitioner, Poe and Webb left the doctor's office (Rec. 17). Some days later, after Hamer had recovered from the shock of the wound in his chest, he told police officers of his participation in the attempted robbery and named petitioner, Poe and Townsend as his accomplices.

Shortly afterwards Hamer was questioned by Morris G. Meyers, who was then an assistant state's attorney of Cook county, Illinois. In his statement to Meyers, Hamer said in substance that he went for an automobile ride with petitioner, Poe, Webb and Townsend and was not told that they were embarking upon a robbery. He saw no guns until the car pulled in the alley, when for the first time Poe thrust a shotgun in his hands and told him he had to come along. Instructed to stand by the front door, he tried to get out the front door as soon as the shooting began, found it locked, dropped his gun, ran toward the rear, was shot through the chest, helped out in the car and left at Dr. Steinberg's office.

The proprietors of the cocktail lounge confirmed Hamer's claim that he did no shooting.

Identification in the cocktail lounge at the time of the shooting was difficult because it was poorly lighted.

Hamer, petitioner, Poe and Webb were subsequently indicted, largely upon Hamer's confession (Rec. 18).

On February 20, 1939, Hamer pleaded guilty to robbery and was sentenced to the Illinois State Penitentiary for 199 years (Rec. 19-20).

Meyers deposes that after Hamer was sentenced to the penitentiary, he (Meyers), "well knowing that identification of Poe, Napue and Webb if and when apprehended would be of an unsatisfactory character and not the kind of evidence upon which a jury could be asked to inflict a proper, severe penalty, and being unable to determine in advance whether Poe, Napue and Webb would make confessions of their participation in the crime, represented to Hamer that if he would be willing to cooperate with law enforcing officials upon the trial of trials of Poe, Napue and Webb when they were apprehended, that a recommendation for a reduction of his sentence would be made and, if possible, effectuated. Hamer at that time unhesitatingly expressed a complete willingness to cooperate at any time he would be called upon." (Rec. 19.)

Some months thereafter, the date not being shown by the record, Poe was apprehended, made a full confession of his participation in the shooting, substantially corroborating Hamer, admitted firing some shots in the cocktail lounge and admitted that he, together with petitioner and other persons (not including Hamer) had held up several other taverns. Poe had a long criminal record (Rec. 19). He was found guilty of murder by a jury and his punishment was fixed at death. He was executed on April 19, 1940.

Several months later, petitioner was apprehended and returned to Chicago. According to Meyers, to whose affidavit in support Hamer's petition for a writ of *coram nobis* petitioner refers, petitioner "readily admitted his part in the crime and signed a confession wherein he, too, in substance confirmed what Hamer had previously stated, that Hamer was an unwilling participant in the attempted robbery." (Rec. 20.)

In the meantime, Mrs. Neeley, one of the proprietors of the cocktail lounge, had moved to California, and, accord-

ing to Meyers, her identification of petitioner "would be at best highly questionable." (Rec. 20.)

Petitioner was subsequently tried for the murder of Officer O'Malley.

The record does not show whether petitioner's confession was or was not used at his trial.

At petitioner's trial, Hamer testified in the language set forth in petitioner's brief at pages 5 through 7. We do not reproduce the transcript of Hamer's testimony. Suffice is to say that Hamer, after having testified, "There ain't nobody promised me anything", (Rec. 3), further testified that a lawyer from the Public Defender's office whom he could not identify had told the witness that "he, the lawyer, was going to do what he could" for the witness and that he "was trying to get something did for me," (Rec. 4). He testified that Meyers had not promised to "recommend a reduction of sentence to anybody." (Rec. 5.)

Petitioner was convicted and was sentenced to imprisonment in the Illinois penitentiary for 199 years.

As appears from petitioner's Statement of the Case, Meyers resigned his position as assistant State's attorney and filed a petition in the nature of a writ of error *coram nobis* in the criminal court of Cook county on behalf of Hamer, in which petition Meyers disclosed the facts above narrated with respect to Hamer's testimony that Meyers had promised him nothing, whereas Meyers had in fact, according to his affidavit, promised to recommend a reduction of his sentence if he would testify against petitioner and the other defendants.

Upon the hearing in the *coram nobis* proceeding, Benjamin Morgan, a police officer, testified that after petitioner's arrest, petitioner "reenacted the crime". (Rec. 61.)

The trial court denied petitioner relief, stating *inter alia*, in an oral opinion that "We have the confession of Napue (petitioner) plus the testimony—or the evidence at least in this record, that the others also were present." (Rec. 67.)

Upon writ of error the Supreme Court affirmed the denial of petitioner's prayer for relief. The court said in its opinion (Rec. 72):

> "In the case at bar the evidence at the post-conviction hearing leaves little doubt that the prosecutor had promised Hamer if he would give testimony against Napue his cooperative actions would be brought to the attention of the appropriate authorities, to effectuate, if possible, a reduction in his sentence. This would be his reasonable understanding of the statements made by the prosecutor, and the State does not here deny that such a promise was made. Hamer's testimony to the effect that no promise had been given to him was clearly untrue, and had there been no disclosure of its falsity the petitioner's contention would raise a serious constitutional question. Subsequent testimony by Hamer revealed, however, that he had been reluctant to testify unless he received consideration for it, and that prior to the trial he was assured that efforts would be made on his behalf. Such disclosure was sufficient to apprise the jurors that he had some interest or motive in testifying, and enabled them to judge his other testimony in the light thereof. We think, therefore, that under the circumstances of this case the trial court was warranted in concluding there was no constitutional infirmity by virtue of the false statement."

Justice Schaefer and Davis dissented from the opinion (Rec. 73-76).

ARGUMENT.

I.

The courts of Illinois have given due and appropriate consideration to Hamer's false testimony that the assistant State's attorney had promised him nothing and have found with full basis in the record that petitioner's conviction was not due to that falsehood. Therefore petitioner's imprisonment does not deny him due process of law.

The Supreme Court of Illinois has given full consideration in this case to the rule that a conviction obtained by testimony known to the prosecution to be false denies due process of law. That court said in its opinion (Rec. 71):

> "Where a conviction is obtained by the presentation of testimony known by the prosecuting authorities to be perjured, the constitutional requirement of due process is not satisfied. (*Pyle* v. *Kansas*, 317 U. S. 213, 87 L. ed. 214; *Mooney* v. *Holohan*, 294 U. S. 103, 79 L. ed. 791.) To show a denial of due process within the meaning of this rule it is not necessary that the false testimony be concerned directly with the question of guilt. Even though it bears only upon the credibility of a witness, it may have the effect of depriving the accused of a fair trial."

The court then declared (Rec. 71):

> "Whether such effect is present depends, of course, upon the circumstances of the particular case."

It does not appear whether at petitioner's original trial his confession was or was not used against him. Nor does it appear what other evidence for or against him was adduced at the trial.

It was incumbent upon petitioner to demonstrate, not, of course, that an acquittal would have resulted had the jury been apprised that it was Meyers, the prosecutor, and not a member of the Public Defender's staff, who made the readily admissed promise to intercede for him if he should testify for petitioner, but at least that there was such reasonable likelihood that such falsity, if disclosed, would have altered the verdict as to permit the conclusion that the false testimony was such a substantial factor in petitioner's conviction as to warrant the conclusion that due process was denied.

In resolving the question whether Hamer's false statement that it was a member of the Public Defender's staff and not the prosecuting attorney who had made the admitted promise, the Supreme Court of Illinois said in its opinion (Rec. 72):

> "Hamer's testimony to the effect that no promise had given to him was clearly untrue, and had there been no disclosure of its falsity the petitioner's contention would raise a serious constitutional question. Subsequent testimony by Hamer revealed, however, that he had been reluctant to testify unless he received consideration for it, and that prior to the trial he was assured that efforts would be made on his behalf. Such disclosure was sufficient to apprise the jurors that he had some interest or motive in testifying, and enabled them to judge his other testimony in the light thereof. We think, therefore, that under the circumstances of this case the trial court was warranted in concluding there was no constitutional infirmity by virtue of the false statement."

The Supreme Court of Illinois, sustaining the trial court, took full cognizance of fact that the jury was apprised that Hamer's initial claim that he was promised nothing was false and that in fact he was testifying in the hope, induced by a promise of recommendation for

reduction of his sentence, or personal advantage. That court held that petitioner's conviction could not in any reasonable likelihood have been the result of Hamer's naming an assistant public defender, rather than an assistant State's attorney as the author of the promise of a recommendation of leniency.

It fairly appears from the entire record that petitioner admitted his guilt in a confession that he does not assail. It does not appear that he ever denied his guilt. It appears that he reenacted the commission of his crime.

The fact that Hamer had first testified falsely that he had no expectation of reward was known to the jury that convicted petitioner.

This Court's decision most nearly pertinent to the present case is *Hysler* v. *Florida*, 315 U. S. 412. In that case, as in this case, the petitioner had been convicted of complicity in a murder upon evidence that included the testimony of an accomplice. In that case, the petitioner "petitioned the Supreme Court of Florida for permission to apply to the Circuit Court of Duval County, Florida, (the court before which he was originally tried) for writ of error *coram nobis*." Such leave was denied.

A majority of this Court read the opinion of the Supreme Court of Florida as canvassing the questions of fact precipitated in that case and as a resolution of those questions adverse to Hysler. In this case there is no doubt that the Supreme Court of Illinois decided the question of fact: Did Hamer's falsification as to the identity of the author of a promise of recommendation of reduced sentence, the fact of the promise having been known to the jury, deprive petitioner of the substance of a fair trial within the purview of due process?

In the *Hysler* case this Court, speaking of Florida's writ of error *coram nobis*, said, at page 415:

> "This common law writ, in its local adaptation, is Florida's response to the requirements of *Mooney* v. *Holohan*, 294 U. S. 103, for the judicial correction of a wrong committed in the administration of criminal justice and resulting in the deprivation of life or liberty without due process."

The Court said at pages 416-417:

> "Such a state procedure of course meets the requirements of the Due Process Clause . . . Each State may decide for itself whether, after guilt has been determined by the ordinary processes of trial and affirmed on appeal, a later challenge to its essential justice must come in the first instance, or even in the last instance, before a bench of judges rather than before a jury."

In the *Hysler* case this Court held that where the Supreme Court of Florida canvassed the record and, giving due regard to *Mooney* v. *Holohan*, 294 U. S. 103, determined that petitioner had not been deprived of the essential substance of a fair trial, petitioner had not been denied due process of law. This Court affirmed the judgment of the Supreme Court of Florida.

In the instant case it appears that petitioner had admitted his guilt in a confession that he does not assail in this Court, that he had readily reenacted the crime, and that Hamer had admitted that he was testifying in the hope of eventual lenity. The only question was whether upon such a record, Hamer's falsehood as to the identity of the author of the promise of a recommended sentence could in any reasonable likelihood have affected the judgment of the jury. That question was resolved adversely to petitioner by the trial and Supreme Courts of Illinois.

It is worthy of note that the dissenting opinion in the *Hysler* case was premised upon the view that the Supreme Court of Florida had not considered the questions of fact presented in that case.

In this case the Supreme Court of Illinois, according due and appropriate consideration to the prosecutor's concealment of Hamer's false statement that it was a member of the Public Defender's staff rather than the prosecuting attorney who had promised to recommend leniency for Hamer in exchange for their testimony and fully respecting this Court's decision in the *Mooney* and subsequent cases, has determined that the misstatement as to the identity of the author of the promise could not have deprived petitioner of the substance of a fair trial.

It is respectfully submitted that the judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, William C. Wines, one of counsel for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on or before the 17th day of April, 1959, I served copies of the foregoing Brief for Respondent as follows:

By delivering five copies of said Brief for Respondent to:

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WILLIAM C. WINES,
One of Counsel for Respondent.